1996

Don't Try: Civil Jury Verdicts in a System Geared to Settlement

Samuel R. Gross
University of Michigan Law School, srgross@umich.edu

Kent D. Syverud
University of Michigan Law School

DON'T TRY: CIVIL JURY VERDICTS IN A SYSTEM GEARED TO SETTLEMENT

Samuel R. Gross* and Kent D. Syverud**

I. WHAT GETS TRIED 8
A. The Claims 11
B. The Parties and Their Agents 15
1. Plaintiffs and Plaintiffs' Attorneys 15
2. Defendants and Insurance Companies 18
C. The Stakes 27
II. WHAT HAPPENS AT TRIAL 31
A. Time and Cost 31
B. Verdicts 34
C. The Concentration of Damages and Changes over Time 36
D. Losers and Winners 40
III. WHY TRY? 46
A. Why Are Civil Jury Verdicts So Uncompromising? 46
B. Why Do We Have Trials at All? 50
1. Guidance for Settlement 51
2. Strategic Bargaining and Strategic Intransigence 52
3. Non-Economic Interests 57
C. How Might We Change This System? 59
CONCLUSION 62

If it is true, as we often hear, that we are one of the most litigious societies on earth,[1] it is because of our propensity to sue, not our affinity for

---

* Professor of Law, University of Michigan. A.B. 1968, Columbia College; J.D. 1973, University of California, Berkeley.

** Professor of Law, University of Michigan. B.S.F.S. 1977, Georgetown University; J.D. 1981, M.A. 1983, University of Michigan.

For helpful comments on this research, we thank Stephen Burbank, Steven Croley, Theodore Eisenberg, Richard Lempert, Phoebe Ellsworth, Heidi Feldman, Samuel Issacharoff, Gary Schwartz, Charles Silver, Neil Vidmar, Stephen Yeazell, and the participants in presentations at the 1995 Law & Society Association meeting, the 1995 Civil Procedure Conference of the Association of American Law Schools, the Wharton School of Business at the University of Pennsylvania, and the University of Texas Law School. Barbara Gilbert, Michael Thomas, Brent Knight, Joshua Leichter, Helen Melia, Amy Randles, Jeremy Silverman, and Letitia Taylor provided invaluable research assistance at various stages of this project. Terry Adams helped with data analysis. We are also grateful to Kristen Precht, and to the editors of the *UCLA Law Review*, for preparing the tables that appear in this Article. This research was supported by funds from the Cook Endowment of the University of Michigan Law School.

1. *See, e.g.*, PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Derek Bok, *A Flawed System of Law Practice and Training*, HARV. MAG. May–June 1983.

trials. Of the hundreds of thousands of civil lawsuits that are filed each year in America, the great majority are settled; of those that are not settled, most are ultimately dismissed by the plaintiffs or by the courts; only a few percent are tried to a jury or a judge.[2] This is no accident. We prefer settlements and have designed a system of civil justice that embodies and expresses that preference in everything from the rules of procedure and evidence,[3] to appellate opinions,[4] to legal scholarship,[5] to the daily work of our trial

---

But see Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77 (1993); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5 (1983).

2. A new study by Professor Theodore Eisenberg and scholars at the National Center for State Courts estimates that of all civil cases filed nationally (in both state and federal courts), 2.9% go to trial, and nearly half of those are tried before a judge sitting with no jury. Theodore Eisenberg et al., Litigation Outcomes in State and Federal Court: A Statistical Portrait 7 (May 25, 1995) (draft manuscript, on file with authors). *See generally* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994). In California superior courts, for the years 1983–1993, the proportion of personal injury case dispositions through jury trials never exceeded two percent. 1994 JUD. COUNCIL OF CAL. ANN. REP. 126 [hereinafter 1994 JUD. COUNCIL REP.]. (The percentage of all civil cases that went to jury trial is even lower, but that total includes many family law and probate cases in which jury trials were not available.)

3. *See, e.g.*, FED. R. CIV. P. 16(a)(5) (listing facilitation of settlement as one of the objectives of the pretrial conference); FED. R. CIV. P. 16(c) (specifying that court may take appropriate action with respect to settlement and may require parties or representatives with settlement authority to be "present or reasonably available by telephone in order to consider possible settlement of the dispute"). The Advisory Committee Comments on the 1983 and 1993 amendments to Rule 16 make clear that their purpose is to facilitate settlement through the pretrial conference. *See* 97 F.R.D. 165, 209–11 (1983); 146 F.R.D. 603, 603–05 (1993); *see also* FED. R. CIV. P. 68 (shifting costs to a party obtaining a judgment who has previously rejected a more favorable offer of judgment); FED. R. EVID. 408 (making evidence of settlement offers and of conduct or statements made in settlement negotiations inadmissible).

4. *See, e.g.*, Evans v. Jeff D., 475 U.S. 717 (1986) (construing the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994), and Rule 23(e) of the Federal Rules of Civil Procedure to permit a settlement offer conditioned on a plaintiff's waiver of a right to attorney's fees because a contrary rule would "disserv[e] civil rights litigants" by "forcing more cases to trial"); Marek v. Chesny, 473 U.S. 1, 7–11 (1985) (construing the "costs" borne by a winning plaintiff who rejected an offer of judgment under Rule 68 to include plaintiff's post-offer attorney's fees in cases filed under the Civil Rights Attorney's Fees Awards Act of 1976, because such a construction would encourage plaintiffs to settle meritorious civil rights suits). *But see* U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994) (refusing automatic vacatur of a trial court judgment that is settled pending appeal when the settlement agreement provides for vacatur). *See generally* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

5. *See* MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION (1964); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113 (1990).

judges.[6] Our culture portrays trial—especially trial by jury—as the quintessential dramatic instrument of justice. Our judicial system operates on a different premise: Trial is a disease,[7] not generally fatal, but serious enough to be avoided at any reasonable cost.

Preference for settlement is not unique to the American legal system,[8] but it is especially pervasive and strong for several reasons. We have many lawyers by any count, but few judges.[9] As a result, we have very many litigated disputes per judge, so it is essential that most cases be resolved without judgment. This scarcity of judges is possible because of our adversary system of adjudication. In this system, the parties control the development and presentation of facts; the fact finder (judge or jury) is passive and has a comparatively small role in the process. Party control of evidence makes private settlement easier, because the parties themselves, rather than the court, procure the information they need to negotiate. Adversary fact-finding is also expensive, unpredictable (especially if the ultimate tribunal is a jury),

---

6. *See, e.g.*, FREDERICK B. LACEY, FEDERAL JUDICIAL CTR., THE JUDGE'S ROLE IN THE SETTLEMENT OF CIVIL SUITS (1977); Noel P. Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129 (1972); Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1978). Scholars have assessed the effects of judicial involvement in settlement negotiations from a variety of perspectives. *See, e.g.*, WAYNE D. BRAZIL, AMERICAN BAR ASS'N, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES (1985); E. ALLAN LIND ET AL., INSTITUTE FOR CIVIL JUSTICE, THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES (1989); Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DISP. RESOL. 1 (1987); Wayne D. Brazil, *What Do Lawyers Expect from Judges? The Federal Judiciary's Role in the Settlement Arena*, TRIAL, Sept. 1985, at 69; Herbert M. Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28 (1982); Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1984); David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381 (1989); Eugene F. Lynch & Lawrence C. Levine, *The Settlement of Federal District Court Cases: A Judicial Perspective*, 67 OR. L. REV. 239 (1988).

7. Our colleague Edward Cooper, Reporter to the Advisory Committee on the Federal Rules of Civil Procedure of the Judicial Council of the United States, has criticized the prevalent tendency to view a trial as a "pathological event." Edward Cooper, Reports, Minutes of the Civil Rules Advisory Committee 20 (October 21–23, 1993), *quoted in* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 261 n.200 (1995).

8. *See, e.g.*, HAZEL GENN, HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS 146 (1988) (Great Britain); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); *see also* Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 410 (1960).

9. Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1859 (1986).

and, given our scarcity of judges, slow. As a result, the savings to be realized by settlement—in time, money, and risk—are greater than they might be in a quicker, cheaper, and more predictable system. These explanations, of course, are not independent of each other. On the contrary, the major structural reasons for the special importance of settlement in American litigation—scarcity of judges and abundance of lawyers, adversarial fact-finding, trial by jury—are all manifestations of a single cultural value: the preference for private ordering over public control.

Trials, of course, are important beyond their numbers. For the public, trials have the advantage of visibility. They are open and dramatic, while settlements are usually boring and private—in fact, invisible. Their openness also makes trials attractive subjects for study by scholars, with the added benefit that cases that are fought to the end are likely to present more of the issues that we like to study and need to teach. But for practitioners, trials are important primarily because they influence the terms of settlement for the mass of cases that are not tried; trials cast a major part of the legal shadow within which private bargaining takes place.[10] Trials have this standard-setting effect despite the fact that they are not typical of the cases in which their results are used as guides for settlement. Scholars are unanimous in recognizing that trials are *not* representative of the mass of litigated disputes.[11] They seem to be selected because of unusual, rather than common, features such as high stakes, extreme uncertainty about the outcome, and reputational stakes of the parties.[12]

An excellent, although perhaps extreme, example of such a case is *Liebeck v. McDonald's Restaurants*.[13] On February 27, 1992, Mrs. Stella Liebeck, aged 79, a passenger in a car driven by her grandson, bought a cup of coffee at a take-out window of a McDonald's in Albuquerque. With the car stopped, she held the styrofoam cup between her legs, tried to pry off the

10. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979); *see also* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 228 (1982).

11. *See, e.g.*, HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 27-38 (1990); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1073-75 (1989); Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337, 337-40 (1990); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 1-2 (1984).

12. Donald Wittman, *Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313, 327-35 (1988) (high stakes); Priest & Klein, *supra* note 11, at 7 (party optimism); *id.* at 40 (asymmetric stakes).

13. No. CV-93-02419, 1995 WL 360309 (D. N.M. Aug. 18, 1994).

top, and spilled the coffee—which was scalding hot. She suffered third degree burns. She sued, and three years later a jury returned a verdict against the McDonald's Corporation for $160,000 in compensatory damages and $2,700,000 in punitive damages.[14] The verdict became an instant cliché in the tort reform debate. At first, it was the ultimate jury-trial horror story: Woman Gets $2.86 Million for Spilling Her Coffee.[15] Later, it re-emerged as a tale of justice done: Mrs. Liebeck was severely injured—she was hospitalized for eight days and required skin grafts; she was injured because of McDonald's policy of serving coffee fifteen to twenty degrees hotter than its competitors; McDonald's knew the danger of selling coffee at that heat—it had received 700 complaints in the previous five years, some involving serious burns—but it never considered changing its practice; the $2,700,000 punitive damage award was chosen by the jury to be equal to two days worth of coffee revenue for McDonald's; the trial judge reduced the total award to $640,000; in the aftermath of the case, McDonald's lowered the temperature of its coffee.[16]

Needless to say, *Liebeck v. McDonald's* was an unusual trial. The damages were unusually high, and the facts of the claim were uncommon, to say the least. In many respects, however, it is a perfectly representative example of an American civil jury trial—as we shall see.

To understand civil trials in America it is necessary to consider them in the context of the pretrial bargaining in which civil litigation is usually resolved. That is what we attempt in this Article, using two samples of civil jury trials in California state courts, one from 1985–1986 and one from 1990–1991. Both samples were drawn from case reports in *Jury Verdicts Weekly*, a state-wide California jury verdict reporter that is widely used by lawyers in evaluating their cases. In other words, our data were generated by one of the instruments through which trials cast their shadows over

---

14. *A Burning Hot Tall Tale*, HARTFORD COURANT, May 6, 1995, at A12; Andrea Gerlin, *How Hot Do You Like It?*, WALL ST. J., Sept. 1, 1994, at A1; *No Grounds for Hot Coffee Award*, SUN-SENTINEL (Fort Lauderdale) Sept. 19, 1994, at 8A.

15. *E.g.*, *Cafe Au Loi*, THE TIMES (London), Aug. 20, 1994, at 27; *Coffee Case Burns Common Sense*, CHI. SUN-TIMES, Aug. 21, 1994, at 41; *McDonald's Coffee Sending the Wrong Message*, ARIZ. REPUBLIC, Aug. 22, 1994, at B4; *No Grounds for Hot Coffee Award*, *supra* note 14, at 8A; Mike Rosen, *Coffee and $2.9 Million to Go*, DENV. POST, Aug. 20, 1994, at B-11; *Some Use Crying over Spilt Coffee*, THE INDEPENDENT (London), Sept. 4, 1994, at 18; Deborah Winston, *Ronald McDonald Better Have a Really Good Lawyer*, CLEV. PLAIN DEALER, Aug. 23, 1994, at 2A.

16. *E.g.*, *A Burning Hot Tall Tale*, *supra* note 14, at A12; Aaron Epstein, *Spilled Coffee Is at Center of Debate*, PITT. POST-GAZETTE, Mar. 6, 1994, at A1; Steve Wilson, *Coffee—Spill Award No Grounds for Backing Props 103, 301*, ARIZ. REPUBLIC, Oct. 27, 1994, at A2.

settlement negotiations.[17] For the second sample, we interviewed 735 attorneys who represented a plaintiff or defendant in one of the cases and asked them about insurance coverage, fee arrangements, the parties' pretrial bargaining positions, and the factors that drove the cases to trial. This survey provides unique data.[18]

In the first part of the Article we draw a rough portrait of the civil jury-trial caseload of the California superior courts, the state courts of general jurisdiction. Some parts of the description are well known, but the overall picture—a snapshot of civil trial litigation in a major American jurisdiction—is not available anywhere else. Briefly, we find that most civil jury trials in California (over 70%) concern personal injury claims of one sort or another; that almost all plaintiffs, in trials of every sort, are individuals; that the overwhelming majority of these plaintiffs (especially in personal injury cases) pay their attorneys on a contingent basis; and that almost all defendants, except some large businesses and most government entities, have insurance that covers the cost of defending the lawsuit and all or some of the potential damages. Thus, the typical civil jury trial is a personal injury claim by an individual against a large company, in which neither party is playing with its own money: The plaintiff is represented by an attorney whose fee and expenses will be paid out of the recovery (if any), and the defendant has an insurance policy that covers all defense costs and any likely judgment.

17. We have previously written about the settlement negotiations in the cases in the 1985–86 sample. *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 321 (1991).

18. While there are published studies of claims files of insurance companies, *see, e.g.*, PATRICIA M. DANZON & LEE A. LILLARD, THE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS (1982); DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE U.S. (1991); JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION (1986); H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS (1970), they examine neither the prevalence or the impact of insurance—because they are based on data that includes only insured defendants—nor the plaintiffs' attorney fee arrangements, since their data all came from the other side. In the late 1970s, the Civil Litigation Research Project of the University of Wisconsin did collect and report data from both sides, with or without insurance, although its reported data on insurance coverage arrangements underlying the settlement negotiations of cases that were tried is quite limited. *See* DAVID TRUBEK ET AL., UNIVERSITY OF WISCONSIN LAW SCHOOL, CIVIL LITIGATION RESEARCH PROJECT FINAL REPORT (1983). The most comprehensive study of vehicular negligence claims—the largest subset of cases in our sample—is still ALFRED F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS (1964), which studies samples of accidents from police reports through trial. The Conard study does not, however, report insurance or fee arrangements from the sample of tried cases.

Liebeck v. McDonald's fits all those criteria, except that the defendant may well have been self-insured.

In Part II, we describe the outcomes of these trials. There are three notable patterns:

First, most of the total sum of money awarded in these trials is concentrated in a small number of very large cases.

Second, the pattern of outcomes in personal injury trials is very different from that in commercial trials. Plaintiffs lose most personal injury trials—that is, they do less well at trial than they would have by settling—while defendants are more likely to lose in commercial trials. On average, personal injury verdicts are roughly midway between what the plaintiffs demand and what the defendants offer in settlement; on average, commercial verdicts are considerably larger than the plaintiffs' demands as well as the defendants' offers.

Third, jury verdicts are rarely compromises. Compromise, of course, is the essence of settlement, but compromise judgments are also possible at trial. In fact, they hardly ever happen. When a civil dispute ends in trial there is almost always a clear loser, and usually a clear winner as well.

In Part III we examine the role of trial in American civil litigation and consider possible reforms. The key question is the following: Why are compromise verdicts so uncommon? We offer a structural explanation: This is a natural consequence of a legal system in which settlement and trial are mutually exclusive, rather than complementary, methods of dispute resolution, and this consequence is exacerbated by the high cost of trials. Very few cases go to trial, and those that do are atypically difficult disputes that could not be compromised by the parties and are not likely to produce compromise verdicts. *Liebeck v. McDonald's* is a good illustration. The defendant passed up many opportunities to settle, starting with a $2000 demand by the plaintiff before she filed the complaint and ending with a $225,000 recommendation from a mediator. At trial, the issue was framed in all-or-nothing terms: The Case of the Careless Customer vs. The Case of the Callous Corporation. The verdict was much larger than any proposed settlement, but judging from public response, it could just as easily have been zero.

The trials we see are the products of a procedural system that is devouring itself. As we have refined and elaborated the rules for jury trials, we have multiplied the costs of trial both to the parties and to the courts.

The costs to the parties drive them to skip all these expensive procedures and settle; the costs to the system drive judges and rulemakers to find new ways to encourage them to do so. Increasingly, the cases that litigants insist on trying are not only rare but peculiar. In a sense, the *Liebeck* trial was common even in its peculiarities. It is misleading to hold up *Liebeck* as a typical example of American litigation: Car accidents and medical procedures generate a thousand lawsuits for every coffee-burn case, and punitive damage awards in any amount are rare in personal injury trials.[19] But trials are never typical. Ordinary cases of every sort are compromised and settled, and those that are not settled are unusual even if the context is a garden-variety, two-car crash. Trials are the most visible aspect of our system of adjudication, and they show it at its worst. They are the slowest, most expensive, and most contentious cases, in which compromise has failed, and in which the verdict is most likely to seem arbitrary or extreme.

I. WHAT GETS TRIED

The State of California has fifty-eight superior courts, one for each county, including, as of 1991, a total of 789 judges.[20] Together they constitute the largest system of courts of general jurisdiction in the United States. A large portion of the time of these courts is taken up handling criminal cases, and much of the rest is occupied by domestic relations and probate matters, but the California superior courts also have jurisdiction over ordinary civil suits for money and for equitable relief. The cases we studied are a subset of this last category: civil jury trials for monetary damages. Such cases may be brought in superior court if the amount in controversy exceeds the jurisdictional limits of the lower trial courts, the municipal and justice courts. Currently that jurisdictional limit is $25,000.[21] According to the Judicial Council of California, 3191 such cases went to trial in 1985–86, and 3644 in 1990–91.[22]

19. *See infra* note 58.

20. NATIONAL CTR. FOR STATE COURTS, STATE JUSTICE INST., STATE COURT CASELOAD STATISTICS: 1991 ANNUAL REPORT 260 (1993). The figure in the text excludes 135 superior court commissioners or referees.

21. CAL. CIV. PROC. CODE § 86(a) (West 1996); *see infra* note 28.

22. 1994 JUD. COUNCIL REP., *supra* note 2, at 126. The reported figures were obtained by subtracting the numbers of criminal jury trials from the tables for all jury trials.

The publication from which our cases are drawn, *Jury Verdicts Weekly* (*JVW*), attempts to conduct a complete ongoing census of civil jury verdicts in California superior courts.[23] *JVW* itself claims to report on over 90% of superior court trials, state wide; independent estimates are lower, but still quite high.[24] *JVW* case reports include an unusual wealth of information for a jury verdict reporter: not only the nature of the claims, the identities of the parties and their lawyers, and the outcomes of the trials, but also the names and specialties of the expert witnesses, the length of the trials and of the deliberations, and the amounts demanded and offered in settlement negotiations. *JVW* data have been used repeatedly in research on jury verdicts,[25] but not for the purpose for which they seem so naturally suited: a statewide analysis of civil jury trials in the context of the pretrial bargaining that precedes them.

We report on two samples of *JVW* cases. The first sample—which we have described in an earlier article[26]—includes 523 trials, from June 1985 through June 1986. For this sample, we coded data solely from the *JVW* reports. The second sample consists of 359 similar cases from *JVW* reports that were tried between August 1990 and March 1991,[27] except that in the time between these two samples the jurisdictional requirement for a suit in superior court was raised from $15,000 to $25,000,[28] joint liability for puni-

23. *JVW* contains a scattering of verdicts from federal courts and neighboring states, and occasional "interesting settlements."

24. *See* MICHAEL G. SHANLEY & MARK A. PETERSON, COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959–1980, at 80 (1983).

25. *See, e.g.*, MARK A. PETERSON, CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS at xiii (1987); SHANLEY & PETERSON, *supra* note 24, at viii; MICHAEL G. SHANLEY & MARK A. PETERSON, POST TRIAL ADJUSTMENTS TO JURY AWARDS 14 (1987); *see also* Neil Vidmar, *Making Inferences About Jury Behavior from Jury Verdict Statistics: Cautions About the Lorelei's Lied*, 18 LAW & HUM. BEHAV. 599, 599–601 (1994) (surveying scholarship based on jury verdict reporters, including *Jury Verdicts Weekly*, and pointing out methodological perils).

26. *See* Gross & Syverud, *supra* note 17, at 321.

27. Specifically, we coded data for every case that went to a jury in a California state superior court and that was reported in *JVW* Volume 35, Number 14 through Volume 35, Number 26.

28. The jurisdictional amount is set by CAL. CIV. PROC. CODE § 86(a) (West 1996), which defines the civil jurisdiction of the lower trial courts, municipal courts, and justice courts. Section 86(a) was amended in 1985 to increase the jurisdictional limits of these lower courts from $15,000 to $25,000, but the amendment did not apply (i.e., was not available as a basis for a transfer) to cases filed prior to its effective date. *Id.* § 86(d). This means that all the cases in our first sample were subject to the lower limit, and all or virtually all of those in the second sample were subject to the higher limit.

tive damages was eliminated,[29] and state tort law underwent some reform.[30] This sample (like the earlier one) does not include the following types of cases that are occasionally reported in *JVW*: federal trials, cases from neighboring states, directed verdicts, bench trials, and "interesting settlements."

For the second sample, we also conducted interviews with the attorneys who tried the cases. We were quite successful at reaching the attorneys. We interviewed at least one plaintiff's attorney in 92% of the cases and at least one defense attorney in 95%. Our main purpose was to collect information on the plaintiffs' fee arrangements with their attorneys and on the defendants' insurance coverage. We obtained data on the plaintiffs' fee arrangements in 88% of the cases and on the defendants' insurance coverage in 84%.[31]

---

29. In 1986, California voters passed Proposition 51 (enacted as CAL. CIV. CODE § 1431.2 (1995)), restricting the liability of partially culpable defendants for pain and suffering damages to the proportion of their fault. Proposition 51 went into effect immediately upon its passage, and the California Supreme Court has ruled that it does not apply retroactively. Evangelatos v. Superior Court, 753 P.2d 585, 587 (1988); *see also* Elizabeth Graddy, *Tort Reform and Manufacturer Payout—An Early Look at the California Experience*, 16 LAW & POL'Y 49, 51–55 (1994).

30. For an overview of these reforms, see Harry N. Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reforms and the California Courts, 1960–1990*, 66 S. CAL. L. REV. 2050 (1993). The most significant reforms were changes to the state's punitive damages law in the Willie L. Brown-Bill Lockyer Civil Liability Reform Act of 1987 ("Brown-Lockyer"). 1987 Cal. Stat. Ch. 1498. Brown-Lockyer, among other things, raised the standard of proof required of plaintiffs in order to establish culpability for punitive damages (amending CAL. CIV. CODE § 3294(a) (1987) to require proof of oppression, fraud, or malice by "clear and convincing evidence") and specified that the conduct of the defendant must be *despicable* and that to prove malice there must be a showing of *willful* and *conscious* disregard of the rights and safety of others. Brown-Lockyer also completely immunized the manufacturers and sellers of "inherently unsafe" products from liability and required a pre-filing court ruling on the merits of a claim for punitive damages against health care providers. These reforms apply "to all actions in which the initial trial has not commenced prior to January 1, 1988," CAL. CIV. CODE § 3294(e) (1994), and therefore to all cases seeking punitive damages in our second sample.

31. In addition, we used these interviews to check the reliability of the *JVW* data on pretrial bargaining by asking the attorneys to report their recollections of the plaintiffs' pretrial demands and the defendants' pretrial offers. Each respondent was first asked to state the amount of the highest offer and (later in the questionnaire) the lowest demand. If the respondent did not give a figure that was identical to the corresponding figure reported by *JVW*—either because they could not remember or because they remembered a different sum—we then told them what *JVW* reported and asked if that report sounded right or wrong. Fifty-seven percent (57%) volunteered the same offer as *JVW* reported, and another 24% said the *JVW* figure was right or sounded right. Overall, 85% either gave the *JVW* figure for the offer on their own or said it was right, sounded right, or was close; only 13% said the highest offer reported by *JVW* was or sounded wrong. The results for demands are similar but less striking. Fifty-eight percent (58%) volunteered the *JVW* demand we

A. The Claims

What are these trials about? Our main interest is the basis for the claim that the defendant is liable for damages. We classified the cases by the facts of the underlying incidents rather than the legal theory of the claim for relief. The dominant category is clear: The great majority of these trials—over 70%—are personal injury cases of one sort or another.[32] The personal injury trials in our samples are divided into four subcategories: vehicular negligence cases, which include claims based on multiple vehicle accidents, collisions between cars and pedestrians or bicyclists, and passenger-driver disputes; nonvehicular negligence cases, a more heterogenous group that consists primarily of slip and fall claims, automobile accidents allegedly caused by defects in highway design or automobile repair, workplace injuries, and collisions involving means of transport other than cars; medical malpractice claims against doctors and hospitals; and products liability suits against manufacturers or, occasionally, merchants.

About half of the minority of non-personal injury trials were suits over some sort of commercial relationship. We grouped these cases together as "commercial trials," despite a great deal of heterogeneity. They are divided into three subgroups: commercial transactions cases, which mostly involve disputes between parties with significant prior dealings, usually over the sale or financing of items ranging from automobiles, to a shipment of computer chips, to an accounting practice; employment cases, the great majority of

---

coded or said it was right; overall 70% either volunteered it or said it was right, sounded right, or was close; 20% said it was or sounded wrong.

We find these results very encouraging. In these cases—the great majority—in which the respondents remembered the same figures we have used, the survey strongly supports the accuracy of the underlying data. On the other hand, in those cases in which the respondents did not remember or remembered a different number, *JVW* may still be correct. In other words, this is a conservative test of the accuracy of the data. Moreover, some differences between our figures and those the respondents remembered were inevitable, even assuming perfect accuracy, because in some cases our procedures for coding the *highest* offer and *lowest* demand, *see infra* text accompanying note 41, and for totaling offers and demands across multiple parties, *see infra* note 35, are unavoidably arbitrary.

32. Other sources confirm that personal injury claims predominate in American jury trials. *See* Eisenberg et al., *supra* note 2, at 6 (8852 tort trials in a sample drawn from 11,691 cases in state courts, or 75%); *see also* STEVEN K. SMITH ET AL., BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES (1995).

which are wrongful discharge claims (often including a claim of discrimination by race, sex, age, or some other prohibited criterion), but which also include a few complaints about failures to hire, promote, or pay commissions; and real estate cases, which include a wide range of claims of fraud by buyers, sellers, or lessees of residences, offices, and farms, as well as various complex grievances against agents, brokers, and lenders.

The remaining cases are divided into two small categories: "other tort," which includes "unlawful force" cases (assault, battery, and false imprisonment), a scattering of cases involving fraud and other tortious business practices, and nonmedical professional malpractice; and "miscellaneous" cases, among which the only coherent groupings are first-party insurance and indemnification claims. See Table 1.[33]

---

33. A note about the format of the tables in this Article is in order. In Table 1, and in each of the other tables in which cases are broken into categories and tabulated in percents, there is a line—the bottom row in Table 1, the right-most column in some other tables—labeled "Total." The numbers in this line are always "100%." Their purpose is to indicate the direction in which the percentages in the table are to be read: column percents in some instances (e.g., Table 1), row percents in others. Because of rounding errors, the actual percentages reported in the body of the tables may add up to slightly more or less than 100%. Some tables have a bottom row titled "All Cases." This indicates that the data reported in that row are for the entire set of cases that is included in the table rather than any subcategory.

Most tables include one or more figures in parentheses, such as the one at the top of the left-most column of Table 1: "(N = 359)." This indicates that the total number of cases analyzed in that column is 359. Many tables also have number in parentheses following headings for particular categories of cases. For example, "Personal Injury (234)" would mean that 234 personal injury cases are included in the data analyzed in the table in question. The actual number of cases that are analyzed, both for the entire samples and for subcategories, varies from table to table, depending on missing data for the items covered by the table. For example, we have data on the basis for the claim for every case in our 1990–91 sample; therefore the figure above the appropriate column of Table 1 is N = 359. But we do not have data for the plaintiffs' pretrial demands in 30 of those cases; therefore the figure for the column in Table 10 that tabulates mean demands for that sample is N = 329.

TABLE 1

BASES FOR CLAIMS

	1985–86 TRIALS (N = 523)	1990–91 TRIALS (N = 359)
PERSONAL INJURY	**71.3%**	**73.8%**
VEHICULAR NEGLIGENCE	22.0%	25.3%
NONVEHICULAR NEGLIGENCE	29.4%	25.1%
MEDICAL MALPRACTICE	12.4%	15.3%
PRODUCTS LIABILITY	7.5%	8.1%
COMMERCIAL	**14.9%**	**11.4%**
REAL ESTATE	5.4%	3.1%
EMPLOYMENT	4.8%	4.7%
COMMERCIAL TRANSACTIONS	4.8%	3.6%
OTHER TORT	**7.1%**	**9.7%**
UNLAWFUL FORCE	4.2%	6.1%
UNFAIR PRACTICES	1.7%	1.4%
PROFESSIONAL MALPRACTICE	1.1%	2.2%
MISCELLANEOUS	**6.7%**	**5.0%**
INSURANCE	4.0%	1.7%
INDEMNIFICATION	1.7%	0.6%
MISCELLANEOUS	1.0%	2.8%
TOTAL	100.0%	100.0%

Trials can also be classified by the type of harm for which the plaintiff seeks compensation. Inevitably, given the distribution of legal claims, the primary harm at issue in most of these cases is physical injury to a person or people. These injury cases, together with a smaller set of cases in which the major harm is death, make up about three-quarters of the total. In most of the remaining quarter the major alleged harm is loss of money (or other liquid assets, or a financial expectancy—not counting income lost as a result of a physical injury), followed by damages to physical property (usually real estate), and intangible damages (loss of reputation, mental anguish unaccompanied by physical injury). See Table 2.

TABLE 2

MAJOR TYPES OF HARM

	1985–86 TRIALS (N = 523)	1990–91 TRIALS (N = 359)
PHYSICAL INJURY	63.3%	70.5%
DEATH	9.4%	8.4%
MONETARY LOSS	21.4%	17.3%
PROPERTY DAMAGE	3.6%	2.8%
INTANGIBLE	2.3%	1.1%
TOTAL	100.0%	100.0%

Not surprisingly, the legal bases for the claims are closely tied to the alleged harms. Eighty-four percent (84%) to 88% of the personal injury cases concern physical injuries, and most of the remainder focus on deaths; 80% to 90% of the commercial cases concern monetary losses, and most of the rest are about property damage.

On the whole, the distributions of the trials, by both criteria, are similar across samples. The smaller groups, of course, are less stable than the larger ones; in general, we do not attempt to draw inferences about any categories

of cases other than personal injury, commercial, and the subcategories of personal injury.

B. The Parties and Their Agents

1. Plaintiffs and Plaintiffs' Attorneys

The plaintiffs in these trials are almost all individuals—93% to 94%. See Table 3. There is some variation in plaintiff type by the type of claim, but not much. For personal injury cases, the dominant category, individuals, includes virtually all of the plaintiffs; for other torts it includes about 90%; for commercial and miscellaneous cases, individuals constitute two-thirds to three-quarters of the plaintiffs.

TABLE 3

TYPE OF PLAINTIFF

	1985–86 TRIALS (N = 523)	1990–91 TRIALS (N = 359)
INDIVIDUAL	93.5%	94.2%
SMALL BUSINESS	4.4%	2.2%
LARGE BUSINESS	1.9%	3.3%
GOVERNMENT	0.2%	0.3%
TOTAL	100.0%	100.0%

For our 1990–91 sample, we have interview data on the plaintiffs' fee arrangements with their attorneys. (Pretesting revealed that defense attorneys are almost invariably paid by the hour.) The pattern we found is stark: Almost all individual plaintiffs—96%—pay their lawyers on a contingent-fee basis. The few business and government plaintiffs are equally likely to pay by the hour, but because individuals make up 94% of all plaintiffs, their fee pattern dominates. See Table 4.

TABLE 4

ATTORNEY FEE ARRANGEMENT
BY TYPE OF PLAINTIFF

1990–91 TRIALS

	CONTINGENT	HOURLY	CONTINGENT PLUS HOURLY	OTHER	TOTAL
INDIVIDUAL PLAINTIFFS (303)	96%	2%	1%	1%	100%
BUSINESS AND GOVERNMENT PLAINTIFFS (14)	43%	43%	0%	14%	100%
ALL CASES (317)	94%	4%	1%	1%	100%

As a result, contingent fees are essentially the only mode of payment in personal injury cases, while other methods make some showing in commercial cases and in other types of cases in which there is a significant representation of non-individual plaintiffs. See Table 5.

TABLE 5

PLAINTIFFS' ATTORNEY FEE ARRANGEMENTS
BY TYPE OF LAWSUIT

1990–91 TRIALS

	CONTINGENT	HOURLY	CONTINGENT PLUS HOURLY	OTHER	TOTAL
PERSONAL INJURY (234)	99%	0%	0%	1%	100%
VEHICULAR NEGLIGENCE (80)	100%	0%	0%	0%	100%
NONVEHICULAR NEGLIGENCE (75)	100%	0%	0%	0%	100%
MEDICAL MALPRACTICE (52)	96%	0%	0%	4%	100%
PRODUCTS LIABILITY (27)	100%	0%	0%	0%	100%
COMMERCIAL (32)	65%	27%	9%	0%	100%
OTHER TORT (34)	94%	6%	0%	0%	100%
MISCELLANEOUS (17)	82%	6%	0%	12%	100%
ALL CASES (317)	94%	4%	1%	1%	100%

There is slightly more variance in who advances the out-of-pocket costs of litigation—the money for filing fees, investigation, discovery, expert witness fees, and the like. Some plaintiffs—even some individuals—have to come up with all or some of these funds. As a result, a small number of plaintiffs have to pay at least part of their own way in personal injury trials, and quite a few do so in non-personal injury cases. See Tables 6 and 7.

TABLE 6

WHO ADVANCED PLAINTIFFS' LITIGATION COSTS?

1990–91 TRIALS

	ATTORNEY	CLIENT	SHARED	TOTAL
INDIVIDUAL PLAINTIFFS (299)	84%	11%	6%	100%
BUSINESS AND GOVERNMENT PLAINTIFFS (15)	40%	47%	13%	100%
ALL CASES (314)	82%	12%	6%	100%

TABLE 7

WHO ADVANCED PLAINTIFFS' LITIGATION COSTS?

1990–91 TRIALS

	ATTORNEY	CLIENT	SHARED	TOTAL
PERSONAL INJURY (233)	91%	5%	4%	100%
VEHICULAR NEGLIGENCE (80)	94%	4%	3%	100%
NONVEHICULAR NEGLIGENCE (76)	92%	4%	4%	100%
MEDICAL MALPRACTICE (50)	84%	8%	8%	100%
PRODUCTS LIABILITY (27)	93%	4%	4%	100%
COMMERCIAL (33)	33%	52%	15%	100%
OTHER TORT (32)	72%	19%	9%	100%
MISCELLANEOUS (16)	63%	31%	6%	100%
ALL CASES (314)	82%	12%	6%	100%

Our findings on plaintiffs' fee arrangements are consistent with data from other sources. In particular, Herbert Kritzer reports that most individual plaintiffs in ordinary civil litigation paid their lawyers on a contingency basis.[34] Kritzer found that 87% of the individual tort plaintiffs in his survey paid their lawyers contingent fees, and another 3% paid flat fees plus a contingent percentage. Our data are even more stark—99% of personal injury plaintiffs' lawyers received straight contingencies. See Table 5. This suggests that the minority of personal injury cases in which the plaintiffs are obliged to pay a portion of the fee in advance are even less likely to go to trial than the average tort case.

2. Defendants and Insurance Companies

The defendants in these trials are more variable than the plaintiffs.[35] The plurality—over a third—are large businesses, followed by a slightly smaller group of individuals and much smaller groups (12% to 17%) of small businesses and governmental entities. See Table 8.

TABLE 8

TYPE OF DEFENDANT

	1985–86 TRIALS (N = 523)	1990–91 TRIALS (N = 359)
LARGE BUSINESS	45.1%	37.0%
INDIVIDUAL	30.6%	32.6%
SMALL BUSINESS	12.4%	14.2%
GOVERNMENT	11.9%	16.2%
TOTAL	100.0%	100.0%

34. KRITZER, *supra* note 11, at 58–59.

35. When a case went all the way to trial with multiple plaintiffs or defendants (that is, when at least two plaintiffs or defendants remained in the case at the time of jury deliberations), we coded each side of a case as a unit and assigned it to the category of the largest party on that side, with size counted on a decreasing scale as follows: government defendant, large business, small business, and individual. We also aggregated demands, offers, and judgments across all parties on each side. Thus, for example, the "offer" coded is the highest amount that all defendants offered to pay all plaintiffs. *See infra* text accompanying note 41.

The distribution of types of defendants varies a great deal by the type of claim, as shown in Tables 9 and 10. For example, vehicular negligence defendants are mostly individuals, but defendants in other negligence cases are generally large businesses or governments; most medical malpractice defendants are individuals (doctors), but quite a few are large businesses (hospitals); almost all products liability defendants are large companies; and unlawful force defendants are typically governmental.

TABLE 9

TYPE OF DEFENDANT BY TYPE OF CLAIM

1985–86 TRIALS

	LARGE BUSINESS	INDIVIDUAL	SMALL BUSINESS	GOVERNMENT	TOTAL
PERSONAL INJURY (373)	**47%**	**34%**	**5%**	**14%**	100%
VEHICULAR NEGLIGENCE (115)	23%	62%	0%	16%	100%
NONVEHICULAR NEGLIGENCE (154)	53%	13%	12%	21%	100%
MEDICAL MALPRACTICE (65)	43%	57%	0%	0%	100%
PRODUCTS LIABILITY (39)	97%	0%	3%	0%	100%
COMMERCIAL (78)	**28%**	**22%**	**49%**	**1%**	100%
REAL ESTATE (28)	21%	36%	39%	4%	100%
EMPLOYMENT (25)	28%	4%	68%	0%	100%
COMMERCIAL TRANSACTIONS (25)	36%	24%	40%	0%	100%
OTHER TORT (37)	**30%**	**32%**	**11%**	**27%**	100%
UNLAWFUL FORCE (22)	18%	27%	9%	46%	100%
UNFAIR PRACTICES (9)	78%	11%	11%	0%	100%
PROFESSIONAL MALPRACTICE (6)	0%	83%	17%	0%	100%
MISCELLANEOUS (35)	**83%**	**9%**	**9%**	**0%**	100%
INSURANCE (21)	100%	0%	0%	0%	100%
INDEMNIFICATION (9)	67%	11%	22%	0%	100%
MISCELLANEOUS (15)	40%	40%	20%	0%	100%
ALL CASES (523)	**31%**	**12%**	**45%**	**12%**	100%

TABLE 10

TYPE OF DEFENDANT BY TYPE OF CLAIM

1990–91 TRIALS

	LARGE BUSINESS	INDIVIDUAL	SMALL BUSINESS	GOVERNMENT	TOTAL
PERSONAL INJURY (265)	**34%**	**37%**	**13%**	**15%**	100%
VEHICULAR NEGLIGENCE (91)	17%	63%	12%	9%	100%
NONVEHICULAR NEGLIGENCE (90)	37%	14%	20%	29%	100%
MEDICAL MALPRACTICE (55)	33%	53%	6%	9%	100%
PRODUCTS LIABILITY (29)	86%	0%	10%	3%	100%
COMMERCIAL (41)	**59%**	**17%**	**20%**	**5%**	100%
REAL ESTATE (11)	55%	18%	18%	9%	100%
EMPLOYMENT (17)	65%	12%	18%	6%	100%
COMMERCIAL TRANSACTIONS (13)	54%	23%	23%	0%	100%
OTHER TORT (35)	**17%**	**6%**	**17%**	**37%**	100%
UNLAWFUL FORCE (22)	5%	0%	14%	59%	100%
UNFAIR PRACTICES (5)	100%	0%	0%	0%	100%
PROFESSIONAL MALPRACTICE (8)	0%	10%	38%	0%	100%
MISCELLANEOUS (18)	**67%**	**6%**	**11%**	**17%**	100%
INSURANCE (6)	100%	0%	0%	0%	100%
INDEMNIFICATION (2)	100%	0%	0%	0%	100%
MISCELLANEOUS (10)	40%	10%	20%	30%	100%
ALL CASES (359)	**37%**	**33%**	**14%**	**16%**	100%

On the defense side, the agency issue of interest is insurance. Despite its obvious importance, there are few data on this subject. As far as we know this study is the first systematic report on liability insurance coverage in American civil trials.

We asked the attorneys in our 1990–91 sample separately about insurance coverage for damages and for the costs of defense. As to damages, we coded insurance as "complete" if the entire amount sought or awarded was covered by the policy. Otherwise, we coded the insurance as "incomplete,"

meaning that the defendant remained partially liable for damages for one or more of the following reasons: a comparatively low policy limit on the insurer's liability, a requirement of a deductible payment by the insured, a coverage dispute, or an uncovered claim in a multi-claim complaint. Overall, most defendants (59%) had complete insurance, and about half of the rest had partial insurance, but the prevalence of insurance varied inversely with the defendants' size. Individual defendants were most likely to have complete insurance and they rarely had none; small companies were slightly less likely to have complete insurance and somewhat more likely to have no insurance; only about half of large company defendants had complete insurance; and two-thirds of government defendants had none at all. See Table 11.

TABLE 11

LIABILITY INSURANCE COVERAGE BY TYPE OF DEFENDANT

1990-91 TRIALS

	COMPLETE COVERAGE†	PARTIAL COVERAGE††	NO INSURANCE	TOTAL
LARGE BUSINESS DEFENDANTS (108)	54%	25%	21%	100%
INDIVIDUAL DEFENDANTS (108)	72%	24%	4%	100%
SMALL BUSINESS DEFENDANTS (45)	71%	20%	9%	100%
GOVERNMENT DEFENDANTS (42)	24%	10%	67%	100%
ALL CASES (303)	59%	22%	20%	100%

† Complete coverage indicates that the policy covered the entire amount of damages sought or awarded.

†† Partial coverage indicates that the policy did not cover the entire amount of damages sought or awarded. Reasons for partial coverage included a liability limit, deductible, coverage dispute, and an uncovered claim in a multi-count complaint.

The distribution of insurance also varies by type of claim, in part because different types of defendants are likely to be sued for different sorts of claims. Complete insurance is the rule in vehicular negligence and medical malpractice cases, in which most defendants were individuals, and less common in other cases, in which individual defendants were in the minority. At the other end of the scale, complete absence of insurance is most common in nonvehicular negligence, products liability, and commercial cases, in which

most defendants (in the 1990–91 trials) were large businesses or government entities.[36] See Table 12.

TABLE 12

LIABILITY INSURANCE COVERAGE BY TYPE OF CLAIM

1990-91 TRIALS

	COMPLETE COVERAGE†	PARTIAL COVERAGE††	NO INSURANCE	TOTAL
PERSONAL INJURY (248)	**67%**	**18%**	**16%**	100%
VEHICULAR NEGLIGENCE (87)	67%	24%	9%	100%
NONVEHICULAR NEGLIGENCE (82)	57%	18%	24%	100%
MEDICAL MALPRACTICE (53)	89%	2%	9%	100%
PRODUCTS LIABILITY (26)	50%	27%	23%	100%
COMMERCIAL (24)	**17%**	**42%**	**42%**	100%
OTHER TORT (24)	**29%**	**42%**	**29%**	100%
MISCELLANEOUS (7)	**29%**	**29%**	**43%**	100%
ALL CASES (303)	**59%**	**22%**	**20%**	100%

† Complete coverage indicates that the policy covered the entire amount of damages sought or awarded.

†† Partial coverage indicates that the policy did not cover the entire amount of damages sought or awarded. Reasons for partial coverage included a liability limit, deductible, coverage dispute, and an uncovered claim in a multi-count complaint.

36. We have conducted a more recent survey of *JVW* products liability cases, covering 58 trials that were completed in 1993. Preliminary data from that survey suggest that in the past several years large, corporate defendants are moving toward self-insurance for products liability claims.

Some differences in patterns of insurance, however, cannot be explained by the status of the defendants, at least not in this rough hierarchy. For example, partial insurance is far more common in vehicular negligence cases (24%) than in medical malpractice cases (2%), despite the fact that more vehicular negligence defendants were individuals and fewer were large businesses or governments. The most likely reason is that many motorists only carry the minimum insurance that is required by statute or slightly more, and the liability limits on such policies are too small to provide complete protection against major personal injury claims,[37] while physicians and hospitals carry insurance policies with extremely high policy limits.

Liability insurance contracts almost always require the insurer to pay for the legal defense of any covered claim against the insured. In our sample, most insured defendants did not have to pay anything to defend the lawsuits against them, even if they only had partial coverage for the damages that might be assessed. For example, although 24% of vehicular negligence defendants had incomplete insurance, only 1% had to contribute to the legal costs of their defense. In general, complete coverage for defense costs was least common in those categories of cases in which complete insurance was least common: products liability and commercial cases. See Table 13. Similarly, the defendants most likely to have insurance—individuals and small companies—were also most likely to have complete coverage for defense costs. See Table 14.

It is quite possible that, with respect to insurance, trials are unrepresentative of the universe of litigated claims. For example, many civil filings, in California superior courts as elsewhere, end in default judgments for the plaintiffs.[38] It is possible, but by no means certain, that a relatively

37. The minimum liability limits for California automobile insurance policies in 1988–89 were $15,000 for any injured individual, $30,000 for personal injuries in any one accident, and $5000 for property damage. INSURANCE INFO. INST., INSURANCE FACTS: 1988–89 PROPERTY/CASUALTY FACT BOOK 111 (1988).

38. *See* SMITH ET AL., *supra* note 32, at 3 tbl.2 (in 1992, 3.1% of all tort cases in nation's 75 largest counties ended in default judgments, and 2.9% ended in trial verdicts).

TABLE 13

WHO PAID DEFENDANTS' LEGAL FEES AND COSTS?

1990–91 TRIALS

	INSURED DEFENDANTS		UNINSURED DEFENDANTS	
	INSURANCE COMPANY PAID	INSURANCE COMPANY AND DEFENDANT PAID†	DEFENDANT PAID	TOTAL
PERSONAL INJURY (247)	77%	7%	16%	100%
VEHICULAR NEGLIGENCE (87)	90%	1%	9%	100%
NONVEHICULAR NEGLIGENCE (82)	61%	15%	24%	100%
MEDICAL MALPRACTICE (53)	91%	0%	9%	100%
PRODUCTS LIABILITY (25)	56%	20%	24%	100%
COMMERCIAL (26)	46%	16%	39%	100%
OTHER TORT (23)	52%	18%	30%	100%
MISCELLANEOUS (7)	57%	0%	43%	100%
ALL CASES (303)	72%	8%	20%	100%

† In most of these cases, the defendant paid a deductible (or self-insured retention) toward defense costs. In the rest, the insurance did not cover all of the defense costs because of a policy limit capping coverage (one case), a dispute with the insurance company over coverage (three cases), an uncovered claim or claims in a multi-count complaint (three cases), or for other reasons (three cases).

TABLE 14

WHO PAID DEFENDANTS' LEGAL FEES AND COSTS?

1990–91 TRIALS

	INSURED DEFENDANTS		UNINSURED DEFENDANTS	
	INSURANCE COMPANY PAID	INSURANCE COMPANY AND DEFENDANTS PAID†	DEFENDANT PAID	TOTAL
INDIVIDUAL DEFENDANTS (108)	95%	1%	4%	100%
SMALL BUSINESS DEFENDANTS (44)	89%	2%	9%	100%
LARGE BUSINESS DEFENDANTS (106)	61%	17%	22%	100%
GOVERNMENT DEFENDANTS (44)	25%	11%	64%	100%
ALL CASES (302)	72%	8%	20%	100%

† In most of these cases, the defendant paid a deductible (or self-insured retention) toward defense costs. In the rest, the insurance did not cover all of the defense costs because of a policy limit capping coverage (one case), a dispute with the insurance company over coverage (three cases), an uncovered claim or claims in a multi-count complaint (three cases), or for other reasons (three cases).

high proportion of these defaults are taken in cases in which the defendant has no insurance and no significant assets to protect, and therefore little incentive to either defend or settle. It is also possible, but equally uncertain,

that large damage claims against defendants who have insurance policies with low liability limits—claims that we would categorize as "partially insured" if the case went to trial—are less likely to be tried than similar claims against defendants with higher policy limits. When the policy limit is low, the insurance company has less at stake in settlement negotiations, but may face disproportionately high costs and risks at trial.[39] Our data do not speak to these issues, and it is unclear where to find data that do, because the only alternative sources that are sometimes available are closed claims files of insurance companies, in which the insurance rate is, by definition, close to 100%.

In sum, few parties play this game with their own money. On the plaintiff side, where the vast majority are individuals, attorneys' fees are almost always contingent, and out-of-pocket expenses are also usually advanced by the plaintiffs' attorneys. On the defendant side, most are fully insured against any possible verdict, and more have no responsibility for the legal costs of the defense.

Some parties, of course, do not fit this pattern. In particular, a substantial minority of large business defendants are uninsured. The only major exception, however, is government defendants, two-thirds of which had no insurance. Overall, there was a government entity as a defendant in about one-seventh of all the cases for which we have information on insurance, but in nearly half of those trials at which the defendants were uninsured. This is the sort of exception that proves a rule. A cynic might say that the problem with government is precisely that its officers always play with other people's money, but the same is true of corporate managers. There is no dispute, however, that governments operate under very different economic constraints from individuals or private businesses, and might well act differently in the context of litigation.

One rule seems to apply almost across the board: The real contestants at trial are almost all at least moderately big players. If the parties themselves do not have ample resources of their own, and often even if they do, they are financed (and perhaps controlled) by substantial players with long-term positions in the game of litigation.

---

39. Syverud, *supra* note 5, at 1135–36.

C. The Stakes

The lower limit of a party's ambition at trial is set by its opponent's position in pretrial bargaining. No plaintiff will go to trial unless she hopes to get a judgment that is (at a minimum) greater than the defendant's best offer, and no defendant will go to trial unless he thinks he has a shot at a verdict that is lower than the plaintiff's lowest demand. Pretrial demands and offers do not limit the range of possible jury verdicts. A plaintiff who turned down a substantial offer may recover nothing at trial, or a defendant may be ordered to pay far more than the plaintiff would have accepted as a settlement; in fact, as we will see, such outcomes are common.[40] But the parties' pretrial positions provide a different and equally useful measure of the monetary stakes: They define the gap over which the trial was fought.

JVW includes data on pretrial bargaining. Sometimes it includes too many data. For some trials, *JVW* reports multiple offers or multiple demands, or both, or conflicting information from the two sides on one or both of these items. In these situations, we coded the highest offer mentioned by *JVW*, and the lowest demand. In most cases, that choice simply reflects the fact that the lowest demand (or highest offer) was the most moderate of several positions taken by that side. That is what we intend: to describe the smallest gap that existed between the parties' positions at any time before verdict. In some cases, however, multiple demands or offers are reported because of uncertainty or conflicting information. In that situation our coding convention is based on a plausible but untestable assumption that if the opposing side had agreed to *any* one of these positions the case would have settled.[41] In other words, our coding is biased toward convergence in pretrial negotiations.

Overall, plaintiffs asked for a mean of $280,000 in 1985–86 and $494,000 in 1990–91; they were offered, on average, $44,000 and $73,000, respectively. Similarly, the mean of the difference between the amounts demanded and offered—roughly, the sum of money over which the parties went to trial—went from $238,000 to $424,000. See Tables 15 and 16.

---

40. *See infra* Tables 24, 25 and accompanying text.

41. For a more complete description of our coding procedures, see Gross & Syverud, *supra* note 17, at 387–89.

TABLE 15

PRETRIAL BARGAINING

1985–86 TRIALS

	(1) MEAN DEMAND (IN $1000's) (N = 479)	(2) MEAN OFFER (IN $1000's) (N = 494)	(3) MEAN OF (DEMAND – OFFER) (IN $1000's) (N = 477)	(4) MEAN OF (OFFER/DEMAND) (N = 477)	(5) PERCENT OF ZERO OFFERS (N = 494)
PERSONAL INJURY	**$262**	**$47**	**$215**	**0.25**	**26%**
VEHICULAR NEGLIGENCE	134	41	93	0.34	15%
NONVEHICULAR NEGLIGENCE	256	45	210	0.24	20%
MEDICAL MALPRACTICE	287	29	258	0.10	60%
PRODUCTS LIABILITY	644	106	536	0.25	22%
COMMERCIAL	**328**	**48**	**295**	**0.20**	**18%**
OTHER TORT	**419**	**6**	**413**	**0.11**	**47%**
MISCELLANEOUS	**235**	**38**	**193**	**0.31**	**32%**
ALL CASES	**$280**	**$44**	**$238**	**0.24**	**27%**

TABLE 16

PRETRIAL BARGAINING

1990–91 TRIALS

	(1) MEAN DEMAND (IN $1000's) (N = 329)	(2) MEAN OFFER (IN $1000's) (N = 353)	(3) MEAN OF (DEMAND – OFFER) (IN $1000's) (N = 327)	(4) MEAN OF (OFFER/DEMAND) (N = 327)	(5) PERCENT OF ZERO OFFERS (N = 353)
PERSONAL INJURY	**$386**	**$70**	**$318**	**0.31**	**27%**
VEHICULAR NEGLIGENCE	294	81	211	0.44	11%
NONVEHICULAR NEGLIGENCE	486	51	442	0.24	26%
MEDICAL MALPRACTICE	374	69	299	0.22	59%
PRODUCTS LIABILITY	410	97	336	0.23	17%
COMMERCIAL	**1112**	**113**	**988**	**0.26**	**25%**
OTHER TORT	**687**	**20**	**687**	**0.22**	**32%**
MISCELLANEOUS	**462**	**116**	**340**	**0.24**	**28%**
ALL CASES	**$494**	**$73**	**$424**	**0.29**	**27%**

There is a great deal of variation in mean demands and offers among the categories of cases, but much of it is no doubt due to unsystematic fluctuations. This is a well-known problem with means in trial data, because they are heavily influenced by a small number of very large cases,[42] as we will see with respect to verdicts.[43] For example, we attribute no importance to the fact that in 1985–86 the average demand in products liability cases was 252% of the average demand in non-vehicular negligence cases, while in 1990–91 the ratio was 84%. If we exclude the two 1985–86 products liability cases with the largest demands, the mean demand drops by 53%, from $644,000 to approximately $300,000; indeed, removing the single products liability case with the largest demand reduces the demand by 33% to $434,000.[44] The most reliable pattern that we see is probably the comparatively modest amounts at issue in vehicular negligence cases, the most numerous discreet type.

Mean *proportions* are more stable. When the measure is the ratio of offer to demand the range of values is small—0 to 1, as opposed to 0 to 8,000,000—and individual cases do not have disproportionate impacts on the average. Overall, plaintiffs were offered 24% of what they demanded in the early cases and 29% in the later cases. In both samples, vehicular negligence cases stand out with high proportional offers, 0.34 and 0.44 respectively, while medical malpractice cases have (less consistently) low proportional offers, 0.10 and 0.21. We see similar stability in the proportions of cases in which no money whatever was offered by the defendant—27% in both samples. Again, as a group, vehicular negligence plaintiffs had the best offers (only 11% to 15% got zero offers), and medical malpractice plaintiffs had the worst—59% and 60% got no offers at all.

---

42. *See, e.g.*, Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 39–45 (1990); Gross & Syverud, *supra* note 17, at 384–85.

43. *See infra* notes 50–56 and accompanying text.

44. This pattern is reflected in the standard deviations for the means, which are uniformly very large. For example, for the 1985–86 sample, the mean offer for all cases was $44,000 and the standard deviation for that mean was more than twice as large—$98,000; for 1990–91, the mean offer was $73,000 and the standard deviation was $193,000—2.6 times as large.

II. WHAT HAPPENS AT TRIAL

The description of a trial breaks down naturally into the answers to two questions: (1) What evidence and argument did the parties present? In theory, this topic could be explored at almost any length; in practice, we are restricted by our data, and *JVW* reports only a smattering of information on what was presented at trial. (2) What decision did the court reach? For civil jury trials, the answer to that question is typically a single phrase: who won the verdict, and, if it was the plaintiff, how much.[45] *JVW* presents a complete report on this issue, but it is difficult to interpret, because a verdict has little meaning unless you know the context in which it was reached. The context we focus on here is pretrial bargaining. We attempt to interpret the verdicts in these cases in light of the demands and offers made in pretrial negotiations, and by doing so to address a third question: (3) Who lost and who won by going to trial instead of settling?

A. Time and Cost

While *JVW* includes a brief synopsis of the claims, and sometimes of the evidence, it provides few systematic data on the conduct of the trials it reports. We do know the length of the trials and the length of the deliberations, which averaged about nine days and about nine hours, respectively, for each sample. We also know the number of expert witnesses and their specialties.[46] The mean number of experts increased from 3.3 per case in

45. In some cases the verdict is slightly more complicated. There may be separate verdicts on each of several separate causes of action, or for each of several plaintiffs, or against each of several defendants, or for some combination of these situations. In multiple party and multiple claim situations, the figure that we have coded for "the verdict" is the total that all defendants have been held liable to pay to all plaintiffs, on all claims. *See* Gross & Syverud, *supra* note 17, at 387–89. In addition, in some cases *JVW* reports punitive and compensatory damages separately. *See infra* notes 57–58 and accompanying text.

46. For the 1985–86, cases we coded the specialties of the expert witnesses in detail. Across all cases, they were distributed as follows:

1985–86 to 4.1 in 1990–91, and the mean number of medical experts went from 1.9 to 2.4—which, no doubt, made the trials more expensive. See Tables 17 and 18.

All three factors vary across the categories of claims. Personal injury trials use many more medical experts than other cases and, therefore, more experts in general. On the other hand, personal injury cases, as a group, take less time to try than commercial cases. Among personal injury trials, there seems to be a scale, running from vehicular negligence, through nonvehicular negligence and medical malpractice, to products liability. At each step the trials take longer, use more experts, and cost more money. Finally, there is a close association between the mean length of trial and the mean length of deliberations, with the ratio staying close to one hour of deliberations for each day of trial in each sample and for almost every sizeable category of cases.

TYPE OF EXPERT	PROPORTION OF APPEARANCES
MEDICAL EXPERTS	**58%**
MEDICAL DOCTORS	49%
PSYCHOLOGISTS	3%
OTHER MEDICAL EXPERTS	6%
MECHANICAL AND INDUSTRIAL EXPERTS	**20%**
ENGINEERS	9%
SCIENTISTS	3%
AGRICULTURAL EXPERTS	2%
HUMAN FACTORS EXPERTS	1%
SECURITY AND SAFETY EXPERTS	2%
OTHER MECHANICAL AND INDUSTRIAL EXPERTS	3%
BUSINESS AND FINANCE EXPERTS	**11%**
FINANCE EXPERTS	8%
REAL ESTATE EXPERTS	2%
BUSINESS PRACTICE EXPERTS	1%
RECONSTRUCTION EXPERTS	**6%**
LEGAL EXPERTS	**2%**
INVESTIGATORS	**1%**
MISCELLANEOUS AND UNKNOWN	**1%**
TOTAL	100%

See generally Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113.

TABLE 17

1985–86 TRIALS

	MEAN TRIAL LENGTH (IN DAYS) (N = 447)	MEAN JURY DELIBERATION (IN HOURS) (N = 426)	MEAN NUMBER OF EXPERTS (N = 529)	MEAN NUMBER OF MEDICAL EXPERTS (N = 529)
PERSONAL INJURY	**8**	**9**	**3.8**	**2.5**
VEHICULAR NEGLIGENCE	5	6	3.1	2.3
NONVEHICULAR NEGLIGENCE	9	9	3.6	1.8
MEDICAL MALPRACTICE	11	10	4.6	4.4
PRODUCTS LIABILITY	12	13	5.0	2.3
COMMERCIAL	**12**	**11**	**1.5**	**0.3**
OTHER TORT	**10**	**11**	**2.3**	**1.2**
MISCELLANEOUS	**12**	**10**	**3.2**	**0.8**
ALL CASES	**9**	**9**	**3.3**	**2.0**

TABLE 18

1990–91 TRIALS

	MEAN TRIAL LENGTH (IN DAYS) (N = 357)	MEAN JURY DELIBERATION (IN HOURS) (N = 352)	MEAN NUMBER OF EXPERTS (N = 353)	MEAN NUMBER OF MEDICAL EXPERTS (N = 353)
PERSONAL INJURY	**8**	**7**	**4.6**	**3.1**
VEHICULAR NEGLIGENCE	6	6	4.2	2.9
NONVEHICULAR NEGLIGENCE	8	6	4.1	2.2
MEDICAL MALPRACTICE	10	8	5.5	4.8
PRODUCTS LIABILITY	13	13	5.7	3.2
COMMERCIAL	**13**	**14**	**2.6**	**0.4**
OTHER TORT	**10**	**12**	**2.9**	**1.3**
MISCELLANEOUS	**9**	**9**	**2.2**	**0.6**
ALL CASES	**9**	**9**	**4.1**	**2.5**

B. Verdicts

One important measure of the outcome of a set of trials is the average verdict the plaintiffs received. In Table 19, we display the average awards by category of trial, for all trials and for trials in which there was a judgment for the plaintiff in any amount (i.e., trials with nonzero verdicts). The overall mean award nearly doubled from the early cases to the late, from $258,000 to $490,000 for all trials and from $506,000 to $980,000 for trials with judgments for the plaintiffs—reflecting an increase in every category of trial except miscellaneous. A significant proportion of these verdicts consisted of punitive damages: an average of about $59,000 for all trials in 1985–86, or 23% of the total; about $159,000 for all 1990–91 trials, or 32% of the total. As we shall see, these punitive damages were concentrated in a small number of cases, and almost none were awarded in personal injury trials.[47]

As with mean demands and offers, mean awards are higher in commercial cases than in personal injury cases, and lower for vehicular negligence cases than for any other group. See Table 19.

TABLE 19

MEAN JURY AWARDS

	ALL TRIALS		TRIALS WITH JUDGMENTS FOR PLAINTIFFS	
	1985–86 (IN $1000's) (N = 519)	1990–91 (IN $1000's) (N = 357)	1985–86 (IN $1000's) (N = 266)	1990–91 (IN $1000's) (N = 179)
PERSONAL INJURY	**$161**	**$322**	**$358**	**$695**
VEHICULAR NEGLIGENCE	69	159	118	237
NONVEHICULAR NEGLIGENCE	127	541	299	1475
MEDICAL MALPRACTICE	127	276	433	1067
PRODUCTS LIABILITY	633	239	1504	477
COMMERCIAL	**604**	**1779**	**694**	**2916**
OTHER TORT	**205**	**341**	**506**	**568**
MISCELLANEOUS	**578**	**288**	**1190**	**471**
ALL CASES	**$258**	**$490**	**$505**	**$977**

47. See *infra* note 58 and accompanying text.

The same is true for the mean of the award minus the offer by the defendant—the amount by which the plaintiff improved her position by going to trial rather than accepting the defendant's offer. See Tables 20 and 21, column (1). These means are also all positive; in aggregate, plaintiffs of all types recovered a great deal more at trial than they were offered in settlement—an average of $190,000 for all cases in 1985–86 and $426,000 in 1990–91.

By contrast, the means of the award at trial minus the plaintiff's demand are sometimes positive and sometimes negative. See Tables 20 and 21, column (2). In personal injury cases, plaintiffs, as a group, got less than they asked for; in commercial cases, they got more. In aggregate, the awards are much closer to the demands than to the offers. The mean of award minus demand is a mere $39,000 for the 1985–86 trials and $102,000 for the 1990–91 trials. But these comparatively low figures reflect the offsetting effects of opposing patterns in personal injury cases, in which awards are much smaller than demands, and in commercial cases, in which awards are larger than demands. (The patterns among the smaller categories

TABLE 20

THE VERDICTS

1985–86 TRIALS

	(1) MEAN OF (AWARD – OFFER) (IN $1000's) (N = 491)	(2) MEAN OF (AWARD – DEMAND) (IN $1000's) (N = 476)	(3) MEAN OF (AWARD/DEMAND) (N = 475)
PERSONAL INJURY	**$116**	**–$100**	**0.64**
VEHICULAR NEGLIGENCE	28	–61	0.53
NONVEHICULAR NEGLIGENCE	84	–128	0.55
MEDICAL MALPRACTICE	101	–157	0.98
PRODUCTS LIABILITY	545	–7	0.75
COMMERCIAL	**574**	**322**	**1.96**
OTHER TORT	**217**	**–195**	**1.66**
MISCELLANEOUS	**308**	**–146**	**1.93**
ALL CASES	**$196**	**–$39**	**0.95**

TABLE 21

THE VERDICTS

1990–91 TRIALS

	(1) MEAN OF (AWARD – OFFER) (IN $1000's) (N = 351)	(2) MEAN OF (AWARD – DEMAND) (IN $1000's) (N = 327)	(3) MEAN OF (AWARD/DEMAND) (N = 327)
PERSONAL INJURY	**$258**	**–$187**	**0.87**
VEHICULAR NEGLIGENCE	77	–133	0.89
NONVEHICULAR NEGLIGENCE	509	–319	0.52
MEDICAL MALPRACTICE	212	–102	1.86
PRODUCTS LIABILITY	156	–113	0.87
COMMERCIAL	**1711**	**710**	**1.07**
OTHER TORT	**330**	**–320**	**1.39**
MISCELLANEOUS	**172**	**–160**	**0.71**
ALL CASES	**$426**	**–$102**	**0.93**

of cases are less consistent.) We see the same thing when we examine the mean of the award as a proportion of the plaintiff's demand. See Tables 20 and 21, column (3). By this measure too,[48] as a group, plaintiffs in personal injury cases got less than they asked for in settlement negotiations,[49] but plaintiffs in commercial cases got more than they demanded.

C. The Concentration of Damages and Changes over Time

The damages awarded in civil jury trials are highly concentrated. In the 1985–86 sample, the 5% of cases with the largest verdicts accounted for over 67% of all damages awarded; among the 1990–91 personal injury cases, they accounted for 78% of the damages. Similarly, half of all damages were

48. As we explained above, *supra* note 44 and accompanying text, the mean award (or offer or demand) for a set of cases is likely to be disproportionately influenced by a few giant cases. That will be true as well for the mean of the award minus the demand, which will be proportional to the stakes in the case, but not for the mean of a ratio, such as award divided by demand.

49. The only exception is the set of 1990–91 products liability cases.

awarded in 3% of the 1985–86 trials and in 1% of the 1990–91 trials. See Table 22.

TABLE 22

CONCENTRATION OF DAMAGES

	1985–86 TRIALS (N = 519)	1990–91 TRIALS (N = 357)
PROPORTION OF ALL DAMAGES IN 5% OF CASES WITH LARGEST VERDICTS	67%	78%
PROPORTION OF VERDICTS THAT INCLUDES 50% OF ALL DAMAGES	3%	1%

By either measure, a small number of high verdicts dominate the aggregate sum of damage awards, and, although 70% of all trials are personal injury cases, most of the largest verdicts occurred in other categories of claims. Only one of the top ten verdicts in 1985–86 was in a personal injury trial, and only five of the top ten in 1990–91. Six of the top ten verdicts in 1985–86 and five in 1990–91 were in commercial trials. (Punitive damage awards were even more concentrated. In the 1985–86 sample more than half the total punitive damages were awarded in 3 out of 519 trials, none of which were personal injury cases; for 1990–91, almost 80% of all punitive damages were included in a *single* award of $45,000,000 in an employment case.)

The worst a plaintiff can do at trial is to recover nothing, a zero verdict. In any unweighted aggregation of damages, dozens of zero verdicts will be swamped by a single award of $30,000,000. These few enormous judgments inflate the size of the mean award. Because of this distortion some researchers argue that the mean verdict is an unrepresentative and misleading measure of the outcomes of civil cases.[50] This is true, in part. For a plaintiff, a mean so heavily influenced by rare large verdicts is an inflated estimate of the value of a claim. Most cases, of course, are not in the running for the very largest verdicts; those depend on very high lost earnings, injuries that require costly life-long care, major monetary or property losses, or outrageous conduct by a defendant with the assets to support a massive punitive damages award. Still, apparently commonplace personal injury or employment cases do produce a wide range of outcomes, with occasional outsized verdicts. But this opportunity is of little value for any particular

50. *See, e.g.*, Daniels & Martin, *supra* note 42, at 39–43.

plaintiff, because she is unlikely to cash in on the remote chance of a grand prize and there is no market in which she can sell her claim to someone who is in a better position to extract its full value.

For the defense, however, the picture is different. Insurance companies, governments, and big businesses—the true defendants in almost all cases—are repeat players. They are in the business of settling and litigating claims. If they take risks in cases in which huge verdicts are possible but unlikely, they will, in time, get hit. For them, the mean expected judgment is an excellent estimate of the cost of a case. In other words, for insurance companies and other repeat litigants, a major goal (if not *the* major goal) in pretrial negotiations must be to avoid those huge verdicts that inflate the mean awards.

The obvious alternative to the mean is the median, but the overall median may be equally misleading. Because half of all cases have awards of zero, the median award (depending on the subset) is either zero or some low number. The median *nonzero* verdict, however, is a useful anchor: the middle point for those cases in which the plaintiffs were successful enough to get some award at trial. Using that as the standard of comparison, the effect of mega verdicts on the means is striking. For example, the mean nonzero verdict for our 1985–86 sample was $505,028, and the median nonzero verdict was $100,000. This comparison highlights one of the mechanisms that drives cases to settlement. If the risk of a case to the defendant is measured by the mean judgment for similar cases, but the value to the plaintiff is much lower—in the range between the median and the median of nonzero awards—then there is a large range of possible settlements between what the plaintiff expects to get and what the defendant fears losing.

The concentration of damages that are actually paid may not be as great as the concentration of damages awarded. Verdicts are sometimes reduced by the trial judge or on appeal, or reversed entirely; more often, the parties negotiate a settlement in lieu of an appeal or a motion for a new trial. Consider what we know about the top several verdicts in the 1990–91 sample. The largest, a $45,376,514 verdict in an employment case, was vacated when the trial judge granted a motion for a new trial because of juror misconduct; when we conducted our survey it was pending on appeal. The second largest, a $35,000,000 personal injury verdict in a highway defect case, was reduced by the trial judge to $12,000,000 and then settled for $17,050,000; the third, a $9,205,000 real estate verdict settled for $7,500,000. The fourth, a $7,200,000 commercial case, and the fifth, a

$6,120,000 negligence verdict, were both pending on appeal when we completed our survey.[51] Lesser verdicts may also be reduced or compromised; indeed, some defense verdicts may be reversed or may produce monetary settlements pending review. Unfortunately, as these top verdicts illustrate, our data on final outcomes are poor. We suspect that the largest verdicts are more likely than the rest to be reduced by negotiation or by court order and that, as a result, the damages paid by defendants are somewhat less concentrated than the verdicts awarded by juries. However, even a substantial change in that direction would leave these awards extremely top heavy.

This extreme concentration of damages makes it difficult to determine whether the size of verdicts has changed over time. As we have seen, the average verdict for all cases increased by about 90% from 1985–86 to 1990–91, from $258,000 to $490,000. See Table 19. We can rule out a couple of possible explanations for this change. Inflation did not do it; it was a modest 19.6% from 1985 to 1990.[52] The 1985 increase in the minimum amount at issue for California superior courts' civil filings, from $15,000 to $25,000,[53] did not do it. In most of the trials in both periods (84% in 1985–86; 90% in 1990–91) the plaintiffs demanded more than $25,000 in pretrial negotiations. Those cases would have been filed in superior court under either rule; looking at them separately, we still see an increase in average verdict of about 75% (from $310,000 to $541,000), or 46% above general inflation.[54] But we cannot rule out the possibility that the increase was due to chance.

The average verdicts in these samples depend heavily on a handful of cases. For example, the two largest verdicts in the 1990–91 sample account for 46% of all damages awarded in this sample of 359 trials. If these two cases are removed from the sample, the mean verdict drops from $490,000 to $266,000—hardly more than the mean for 1985–86. Any change that is

---

51. The largest verdicts in the 1985–86 sample were as follows: (1) $14,750,000 (products liability, trampoline); (2) $12,500,000 (real estate); (3) $9,000,000 (insurance); (4) $7,629,815 (insurance); and (5) $4,025,788 (commercial transaction). Because we conducted no survey of attorneys for the earlier sample, we have even less information on the final outcomes of those trials than we do for the later ones.

52. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CPI DETAILED REPORT 16 (1990). The figure reported in the text represents the cumulative CPI inflation for calendar years 1985 through 1989.

53. *See supra* note 28.

54. We also found comparable increases in the mean offers and demands among cases with demands in excess of $25,000.

attributable to that few cases could well have occurred by chance.[55] By contrast, the other measure of the typical verdict that we have considered—the median nonzero verdict—is unchanged, $100,000 for both periods (and would remain unchanged for 1990–91 if we removed these two largest cases). None of this means that the average verdict in California superior courts did *not* increase from 1985 through 1991. It may well have done so, but it is hard to tell, and these data are insufficient for the task.[56]

D. Losers and Winners

There are many ways to evaluate the outcomes of these trials, even with the limited data at our disposal. The simplest is the proportion of cases with judgments for the plaintiff, regardless of the amount. See Table 23.

TABLE 23

PROPORTION OF TRIALS WITH VERDICTS FOR THE PLAINTIFF

	1985–86 TRIALS (N = 519)	1990–91 TRIALS (N = 357)
PERSONAL INJURY	**45%**	**46%**
VEHICULAR NEGLIGENCE	58%	67%
NONVEHICULAR NEGLIGENCE	43%	37%
MEDICAL MALPRACTICE	29%	26%
PRODUCTS LIABILITY	42%	50%
COMMERCIAL	**87%**	**61%**
OTHER TORT	**41%**	**60%**
MISCELLANEOUS	**49%**	**61%**
ALL CASES	**51%**	**50%**

55. *See supra* notes 42–44 and accompanying text. In statistical terms, this problem is caused by the high variance of these verdicts. For example, the standard deviation for the verdicts for 1985–86 is $1,080,000—4.2 times the mean verdict; for 1990–91 it is $3,140,000—6.4 times the mean. As a result the observed differences between the means are not nearly "statistically significant"—differences that large or larger could well have occurred in the absence of any systematic change in verdict size by the luck of the draw in the selection of cases for our samples or by unsystematic fluctuations in the cases that went to trial.

56. If there was an increase in mean jury verdicts over this period it occurred despite legal reforms that were designed to reduce awards in tort cases. *See supra* notes 29–30.

By that measure, plaintiffs won about 50% of all the cases in each set, but the proportion varies quite a bit from one category of claims to another. Plaintiffs recovered judgments in most commercial and vehicular negligence trials, but lost most of the other personal injury trials. Punitive damages—although a major issue in public debates over tort reform[57]—were awarded in only 7.6% of the early trials and 4.2% of the later ones, and almost never in personal injury trials.[58]

Unfortunately, simply counting up verdicts by side is not a useful way to measure success. An apparent winner—a plaintiff who got a $30,000 verdict, for example—is really a big loser if she had a settlement offer of $100,000, and the defendant in that case is a winner if the lowest settlement demand was $250,000. The real question, for any party, is whether it would have been better off if it had not gone to trial. By that standard, it is easy to spot many of the losers in these trials. Any plaintiff who was offered as much as the verdict or more, and any defendant who could have settled for as much

57. *E.g.*, *Common Sense Legal Reforms Act: Hearings on H.R. 10 Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Commerce*, 104th Cong. (1995) [hereinafter *Hearings*].

58. See text accompanying note 47 for a discussion of the amount and concentration of punitive damages. Overall, the distribution of punitive damage awards was as follows:

PROPORTION OF TRIALS WITH PUNITIVE DAMAGE AWARDS

	1985–86 TRIALS (N = 523)	1990–91 TRIALS (N = 357)
PERSONAL INJURY	**1.1%**	**0.0%**
VEHICULAR NEGLIGENCE	0.9%	0.0%
NONVEHICULAR NEGLIGENCE	1.9%	0.0%
MEDICAL MALPRACTICE	0.0%	0.0%
PRODUCTS LIABILITY	0.0%	0.0%
COMMERCIAL	**32.1%**	**14.6%**
OTHER TORT	**10.8%**	**20.0%**
MISCELLANEOUS	**20.0%**	**11.1%**
ALL CASES	**7.6%**	**4.2%**

All in all, there were four personal injury cases among the 638 personal injury trials in our two samples that produced punitive damage awards in any amount. These awards (none of which were in medical malpractice or products liability trials) *totaled* $253,000—or about $400 per case, a fraction of 1% of personal injury awards. Perhaps punitive damages are more common in other types of personal injury litigation—e.g., products liability trials in federal court—but in California civil trials punitive damages seem to be given almost exclusively for intentional torts and for claims based on violations of obligations in commercial or other ongoing relationships.

as the verdict or less,[59] has lost. In Tables 24 and 25, we see that plaintiffs were clear losers in most of these trials, at least in economic terms—61% overall in 1985–86, 65% in 1990–91.[60]

TABLE 24

CLEAR LOSERS

1985–86 TRIALS

	THE PLAINTIFF		NO CLEAR LOSER	THE DEFENDANT	TOTAL
	Award = 0	0 < Award < Offer	Offer < Award < Demand	Award ≥ Demand	
PERSONAL INJURY (362)	56%	10%	14%	20%	100%
VEHICULAR NEGLIGENCE (111)	43%	19%	19%	19%	100%
NONVEHICULAR NEGLIGENCE (150)	59%	10%	11%	20%	100%
MEDICAL MALPRACTICE (65)	71%	0%	12%	17%	100%
PRODUCTS LIABILITY (36)	61%	3%	11%	25%	100%
COMMERCIAL (64)	16%	9%	20%	55%	100%
OTHER TORT (36)	61%	6%	11%	22%	100%
MISCELLANEOUS (30)	60%	3%	10%	27%	100%
ALL CASES (492)	52%	9%	14%	25%	100%

59. It is possible, under common contingent fee and trial expense arrangements, that a plaintiff will fare *no worse* after a small verdict than she would after a somewhat larger settlement for the simple reason that either way she will recover nothing and be liable for none of the litigation expenses. *See supra* Tables 6 & 7. We would consider that outcome a loss because, if nothing else, the plaintiff will have devoted additional time in the case for no return. In any event, a plaintiff will never do *better* by going to trial unless the verdict is significantly larger than the best available pretrial settlement.

60. In a well-known article, George L. Priest and Benjamin Klein argue that the plaintiff success rate at trial will under most circumstance gravitate to 50%. Priest & Klein, *supra* note 11, at 17–20. This hypothesis does not pan out, as these data illustrate: For most well-defined groups of cases, the plaintiff-success rate is far from 50% by any meaningful measure. For detailed discussions of this issue see Eisenberg, *supra* note 11; Gross & Syverud, *supra* note 17. There is a curious and unexplained pattern that appears repeatedly in jury verdict data: The *overall* rate of defense judgements (Award = 0), across all categories of cases, is frequently quite close to 50%. Because these proportions are obtained by aggregating groups of cases with little overlap in parties, lawyers, or issues, it is hard to see how there could be a systematic explanation that does not depend on some court-based equilibrating mechanism: Being in court is the main thing that ties these groups together.

TABLE 25

CLEAR LOSERS

1990–91 TRIALS

	THE PLAINTIFF		NO CLEAR LOSER	THE DEFENDANT	TOTAL
	Award = 0	0 < Award < Offer	Offer < Award < Demand	Award ≥ Demand	
PERSONAL INJURY (258)	55%	13%	12%	20%	100%
VEHICULAR NEGLIGENCE (91)	33%	28%	15%	24%	100%
NONVEHICULAR NEGLIGENCE (88)	65%	6%	15%	15%	100%
MEDICAL MALPRACTICE (51)	78%	2%	4%	16%	100%
PRODUCTS LIABILITY (28)	50%	11%	7%	32%	100%
COMMERCIAL (37)	43%	11%	0%	46%	100%
OTHER TORT (32)	44%	9%	9%	38%	100%
MISCELLANEOUS (17)	41%	18%	0%	41%	100%
ALL CASES (344)	52%	13%	10%	26%	100%

If the plaintiff does not clearly lose, the defendant usually does: The verdicts are higher than the plaintiff's demand in about a quarter of the trials in each sample, while the cases with no clear loser account for only 14% and 10%, respectively. As with other measures, we see a familiar contrast between personal injury and commercial trials. Plaintiffs consistently lose a majority of personal injury trials, regardless of type; defendants are far more likely to be clear losers in commercial cases (40% and 55%) than in personal injury cases (20%).

What about the parties who oppose clear losers—are they winners? Not necessarily; even if the verdict is a significant improvement over the best available settlement, the trial costs may consume all of the gains, and more. Indeed, regardless of the verdict, it is possible for both the plaintiff and the defendant to lose at trial if, as in *Bleak House*, the costs and fees eat up the assets at stake. Similarly, if the verdict ends up between the parties' pretrial bargaining positions, it is possible for both sides to win. Consider a personal injury case in which the defendant's highest settlement offer before trial is $500,000, and the plaintiff's lowest demand is $2,000,000. Unable to compromise, they each spend $100,000 to conduct a trial at which the jury reaches a verdict of $1,200,000. The net result, after deducting trial costs,

is that the plaintiff has gained $600,000 over her best pretrial option, while the defendant has saved $700,000 over his least expensive alternative.

To divide parties into winners and losers (as opposed to merely picking out the obvious losers), it is necessary to estimate their trial costs. Unfortunately *JVW* does not report costs directly, so we have assumed that they are proportional to the length of the trial, which is reported. Specifically, we assume that each side spent $500 per hour (or $4000 per day) for the 1985–86 cases, and $600 per hour (or $4800 per day) for the 1990–91 cases.[61] On that assumption, a plaintiff has won if she obtained a verdict that is greater than the defendant's highest pretrial offer *plus* $500 or $600 per hour of trial; otherwise, she has lost. The defendant has won if the verdict is less than the plaintiff's lowest demand *minus* $500 or $600 per hour of trial; otherwise, he has lost. This assumption generates the four groups of outcomes that are displayed in Tables 26 and 27: plaintiff wins and defendant loses; defendant wins and plaintiff loses; both win; and both lose.

TABLE 26

WINNERS AND LOSERS
ASSUMING TRIAL FEES AND COSTS ARE $500/HOUR PER SIDE

1985–86 TRIALS

	PLAINTIFF WINS DEFENDANT LOSES	BOTH WIN	BOTH LOSE	PLAINTIFF LOSES DEFENDANT WINS	TOTAL
PERSONAL INJURY (302)	20%	7%	11%	62%	100%
VEHICULAR NEGLIGENCE (96)	18%	7%	14%	62%	100%
NONVEHICULAR NEGLIGENCE (126)	22%	5%	12%	61%	100%
MEDICAL MALPRACTICE (52)	17%	10%	6%	67%	100%
PRODUCTS LIABILITY (28)	21%	7%	11%	61%	100%
COMMERCIAL (48)	50%	13%	17%	21%	100%
OTHER TORT (28)	14%	7%	39%	39%	100%
MISCELLANEOUS (28)	32%	4%	11%	54%	100%
ALL CASES (406)	24%	7%	14%	55%	100%

61. The increase in the assumed cost of trial from 1985–86 to 1990–91 (20.0%) is intended to account for the 19.6% inflation in consumer price index from 1985 to 1990. *See supra* note 52.

TABLE 27

WINNERS AND LOSERS
ASSUMING TRIAL FEES AND COSTS ARE $600/HOUR PER SIDE

1990–91 TRIALS

	PLAINTIFF WINS DEFENDANT LOSES	BOTH WIN	BOTH LOSE	PLAINTIFF LOSES DEFENDANT WINS	TOTAL
PERSONAL INJURY (243)	22%	6%	8%	64%	100%
VEHICULAR NEGLIGENCE (90)	26%	6%	7%	62%	100%
NONVEHICULAR NEGLIGENCE (81)	17%	10%	9%	64%	100%
MEDICAL MALPRACTICE (45)	16%	2%	11%	71%	100%
PRODUCTS LIABILITY (27)	33%	0%	4%	63%	100%
COMMERCIAL (35)	46%	0%	9%	46%	100%
OTHER TORT (29)	38%	0%	24%	38%	100%
MISCELLANEOUS (17)	41%	0%	6%	53%	100%
ALL CASES (324)	27%	4%	9%	60%	100%

In most trials the defendant won and the plaintiff lost—55.2% in 1985–86, 59.6% in 1990–91. When that failed, the positions were usually reversed: The plaintiff won and the defendant lost in 23.9% of the early trials and 26.9% of the later ones. Mutual losses are rare (13.8% and 9.3%, respectively for early and late trials) and compromise verdicts in which each side gains something are even more rare (7.1% and 4.3%). Once again, we see a familiar contrast: Defendants won and plaintiffs lost most personal injury cases (62.3% and 64.6%), while plaintiffs won and defendants lost about half of commercial cases (50.0% and 45.7%).

Our assumptions about the costs of these trials are no more than educated guesses. The averages may be lower or higher, and the actual cost per hour will vary from case to case, and from one side to the other within a case. To test the robustness of our findings, we re-ran these analyses at several different levels of assumed cost. The results, which are reproduced in the margin,[62] show that the overall pattern is quite stable.

62. We looked at the combinations of winners and losers in our trials under four sets of assumptions, varying the trial costs per side from $0/hour to $1000/hour for the 1985–86 cases and from $0/hour to $1200/hour for the 1991–92 cases. The results, for all cases, are displayed below:

III. WHY TRY?

A. Why Are Civil Jury Verdicts So Uncompromising?

In most trials there is at least one loser. This may not sound surprising—it may even seem obvious—and for that reason it is important to remember that losing is not an inevitable feature of adjudication. "Winning" and "losing" are defined by reference to the alternatives, and in this setting the common alternative is settlement. A "loser" at trial is someone who does less well than she could have by accepting an available settlement offer from the opposing side (and a "winner" is someone who does better by that

---

ALL CASES, 1985–86
WINNERS AND LOSERS, ASSUMING VARIOUS AVERAGE TRIAL COSTS

	PLAINTIFF WINS DEFENDANT LOSES	BOTH WIN	BOTH LOSE	PLAINTIFF LOSES DEFENDANT WINS	TOTAL
$0/HOUR (N = 492)	25%	14%	0%	61%	100%
$250/HOUR (N = 406)	26%	8%	4%	62%	100%
$500/HOUR (N = 406)	24%	7%	14%	55%	100%
$1000/HOUR (N = 406)	21%	4%	33%	42%	100%

ALL CASES, 1990–91
WINNERS AND LOSERS, ASSUMING VARIOUS AVERAGE TRIAL COSTS

	PLAINTIFF WINS DEFENDANT LOSES	BOTH WIN	BOTH LOSE	PLAINTIFF LOSES DEFENDANT WINS	TOTAL
$0/HOUR (N = 344)	26%	10%	0%	65%	100%
$300/HOUR (N = 324)	28%	6%	4%	63%	100%
$600/HOUR (N = 324)	22%	4%	9%	60%	100%
$1200/HOUR (N = 324)	24%	3%	27%	47%	100%

The top row in each table defines the limiting condition for low trial costs: none. Obviously, this is not a good description of reality. (Note also that when trials are free, both sides can win but they cannot both lose.) In our opinion, the other end of the scale, the bottom row of each table, is also unrealistic. Some trials are extremely expensive, but the average costs for California state-court trials are not likely to have run as high as $8000 per side per day in 1985–86 or $9600 per side per day in 1990–91.

One final note on these analyses: Twenty-one percent (21%) of the 1985–86 cases have missing data on one or more variables that are essential for this analysis. In most cases the missing item was the length of the trial. The 1990–91 *JVW* data are considerably more complete in this respect; as a result, only 9% of the later cases have missing data that required excluding them from the tabulations.

standard) considering both the judgment and the cost of obtaining it. By that definition, it is perfectly possible for a trial to produce a "win-win" outcome,[63] an adjudicated compromise between the pretrial positions of the parties. However, judging from these samples, win-win outcomes are rare in civil trials in America—by our estimates, 4% to 7%. See Tables 26 and 27. When one side wins, the other almost always loses. And when one side loses, the other usually wins. All-around disasters in which everyone takes a beating are also uncommon—by our estimates, 9% to 14% of civil trials. See Tables 26 and 27. In the great majority of the cases, perhaps 80% to 85%, the verdict is a clear victory for one side and a clear loss for the other.

Why are compromises so rare among the small percentage of cases that go to trial? The major reason seems to be structural: the sharp division we draw between settlement and adjudication. In any system, the parties to a litigated civil dispute are allowed—indeed encouraged—to try to settle their differences on their own. Even if they fail, they are likely to resolve some issues along the way, and to narrow their differences. In the United States, however, these partial compromises generally come to naught if the case proceeds to a jury trial. The dispute shifts to a new mode—adjudication before a fact finder who was not party to any prior partial compromises, under rules of procedure that make reference to settlement discussions improper.[64] At trial all deals are off and all risks are restored. If you fail to settle, you must drop out entirely or pay a lot to gamble at high stakes.

---

63. Writers on negotiation and dispute resolution emphasize the desirability of identifying options for mutual gains to the parties from settlement. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 56–80 (2d ed. 1992); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 14 (1982) ("When there are several issues to be jointly determined through negotiation, the negotiating parties have an opportunity to considerably enlarge the pie before cutting it into shares for each side to enjoy."). When both sides realize gains from the negotiation, it is said to produce a "win-win" outcome. DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 155–57 (1986). Scholars have suggested that "win-win" outcomes are common and achievable in a wide array of negotiating contexts. *See, e.g.*, FRED E. JANDT, WIN-WIN NEGOTIATING (1985); ERWIN RAUSCH, WIN-WIN PERFORMANCE MANAGEMENT/APPRAISAL (1985); WIN-WIN ADMINISTRATION: HOW TO MANAGE AN ORGANIZATION SO EVERYBODY WINS (Stephen K. Blumberg ed., 1983); Kate Bertrand, *Crafting 'Win-Win Situations' in Buyer-Supplier Relationships*, BUS. MARKETING, June 1986, at 42.

64. *See, e.g.*, FED. R. EVID. 408, which provides in part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

This is not the only way to run a court. In Germany, for example, the process is very different.[65] As in America, a primary goal of the system is to facilitate settlement, but that is done by different means. German civil procedure does not distinguish between trial and pretrial proceedings. A case is usually assigned to a single judge, who actively oversees it from start to finish. Along the way, the judge will convene a series of hearings or conferences with the attorneys and parties, identifying and resolving issues, taking testimony and hearing argument as necessary, attempting at each stage to focus on the legal and factual disputes that must be resolved in order to end the case, either by adjudication or by a settlement that completes the court-assisted convergence.[66]

A typical California superior court case, by contrast, is set before a series of judges who know relatively little about the case and who play limited reactive roles at various steps along the way. Pretrial negotiation and much of pretrial litigation go on in private with no judicial oversight at all. The first point at which a judge is likely to take part in an attempt to resolve the case is a settlement conference close to the date of trial, after the parties have failed to settle on their own and have invested a great deal in trial preparations. If that too fails, there is a trial from scratch before a jury that, by definition, knows nothing of the history of the case.

Actual practice in each country is variable and complicated. For the moment, however, it may be useful to reduce these two systems to ideal types: court-assisted settlement backed up by court-imposed compromise, versus private settlement with a high-price poker game as the penalty for failure. The second system, which is pretty much what we live with in America, might as well have been designed to discourage trials. And it does, very successfully; that's why civil trials are so rare.

Few people want to go to trial under these circumstances, or at least they are not willing to own up to it. For our second sample of trials we asked the attorneys an open-ended question: "Why did this case go to trial rather than

---

65. *See* Peter Gottwald, *Simplified Civil Procedure in West Germany*, 31 AM. J. COMP. L. 687 (1983); Kaplan, *supra* note 8; Langbein, *supra* note 8.

66. American civil procedure scholars risk sharp criticism when they summarize German civil procedure in 45 pages, let alone in several paragraphs. *See, e.g.*, Ronald Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988). Our few paragraphs here certainly overgeneralize. A recent manuscript by Professor Peter Gottwald suggests that because of caseload problems German courts need to increse the proportion of cases that are settled out of court; that many cases in the regional courts (Landgerichte) are not conducted by a single judge; and that German courts could benefit from some American innovations that are designed to promote settlement, such as mandatory disclosure in discovery. *See* Peter Gottwald, Civil Procedure Reform in Germany (June 1996) (unpublished manuscript, on file with authors).

settle?" We recorded their answers almost verbatim, and we classified the first reason given by each respondent as follows: Did the attorney say that her side (the party or its attorneys) was responsible for the trial, or did she say that the other side was responsible, or did she mention some other cause? A clear pattern emerged immediately: Each side says the other one did it. Fifty-four percent (54%) of the plaintiffs' lawyers said the defendant or the defense lawyers caused the trial, 19% said their own side did it, and 27% gave some other reason. On the defense side, 41% blamed the opposition, 27% blamed themselves, and 31% chose some nonparty cause. This tendency is as pronounced among winners as among losers. For example, 54% of the plaintiffs' lawyers who recovered nothing at trial blamed the defense for the failure to settle, as did 64% of those who recovered more than $500,000.[67] Attorneys who won hundreds of thousands of dollars said they were forced to court by the defendant's stupidity, and others, who successfully defended big claims, said trial was caused by the plaintiff's greed or craziness. Almost nobody said "We gambled and lost," or "We decided to fight, and we won."

This is the way people talk about unfortunate events—wars or losses, not adventures or victories. That attitude is no surprise, not even coming from lawyers. Attorneys, like insurance adjusters and other regular players in litigation, make their daily bread in negotiation. When a case falls through the cracks into the other costlier and chancier arena, their reactions reflect the judgment of the system as a whole: A trial is a failure. This view of trials is related to their outcomes in two ways. *First*, as a cause: The (accurate) belief that trials are expensive and risky is a powerful incentive to settle those cases that can be settled—to compromise whenever compromise is possible, and to avoid trial at all costs when the stakes are too small for either side to come out ahead.[68] That leaves a residue of all-or-nothing cases that resisted compromise before trial and are likely to produce all-or-nothing verdicts after trial. *Second*, as a consequence: The fact that trials usually are expensive winner-take-all affairs reinforces the consensus that they are dangerous and to be shunned.

And what are these stubborn, uncompromising cases that end in trial? Judging from our data, they are primarily disputes over liability rather than

---

67. For comparison, 45% of defense attorneys who won outright said that the plaintiff's side caused the trial (and 32% said their own side did), while 39% of those who lost $1,000,000 or more blamed their opposition (and 23% blamed their clients or themselves).

68. *See* ROSS, *supra* note 18, at 237–43 (describing how insurance adjusters and lawyers divide automobile accident cases into two groups: (1) large claims, with damages that could possibly justify the cost of trial, which are settled with some attention to the likely outcome of a trial; (2) small claims, which would be uneconomical to try regardless of the outcome, which are settled by an entirely separate system of evaluation that has developed without reference to trial outcomes).

damages. In part, that is inherent in the nature of the issues: Damages is a continuous variable, and therefore more susceptible to compromise and settlement. In addition, if damages were the main issue in contention at most trials we would expect to see more compromise verdicts. A case in which liability is given may go to trial if either party is overly optimistic in its prediction of the award, or overly aggressive in its bargaining, but it is most likely to go to trial if *both* sides are unrealistically optimistic or overly aggressive—if the plaintiff asks for too much *and* the defendant offers too little. When that happens, the verdict is likely to fall between their bargaining positions, and may well be a win-win outcome. The fact that such verdicts are rare suggests that damages is not often the main issue at trial.

Liability, by contrast, is a dichotomous variable. If damages are known but liability is disputed, a trial can only be *avoided* if the parties agree on a discounted figure that reflects the actual damages multiplied by some estimate of the likelihood that a jury will find the defendant liable. Pretrial bargaining will reflect this logic. The plaintiff will not ask for more than the known damages, although in an extreme case she may demand no less, while the defendant will offer some fraction of the real loss, or nothing at all. If the case does go to trial, the jury is likely to side with the defendant and to give the plaintiff nothing, or to side with the plaintiff and give her as much as she demanded in settlement or more. And indeed, one or the other of these outcomes occurred in about 77% of our cases. See Tables 24 and 25. In other words, trials over liability will produce the all-or-nothing battles that we mostly see—cases in which one side always loses, and the other side almost always wins.

B. Why Do We Have Trials at All?

Considering the cost and risk, the interesting question about American litigation is not why there are so few trials, but why we have as many as we do. The obvious problem is resources: How can litigants afford to go to trial? The key, as we have seen, is that the costs and risks are aggregated across many cases, through the twin institutions of contingent fees and liability insurance. Almost all plaintiffs in our cases are individuals (see Table 3), and nearly half of defendants are individuals or small businesses (see Table 8). Such parties, on their own, could rarely muster the funds or the nerve to conduct a superior court trial. The plaintiffs would settle or dismiss; the defendants would settle or default. But a plaintiff with a contingent-fee attorney or a defendant with an insurance company can afford to go ahead, even to trial. As a result, plaintiffs' attorneys and liability insurers play a

major role in determining who has access to court. In most cases, a plaintiff who cannot get a contingent-fee lawyer probably will not be able to sue. One reason plaintiffs' attorneys may decline to take a case on a contingency is that the defendant is uninsured—which means that, except for large institutions, uninsured defendants are unlikely to be sued,[69] and if they are sued, they are unlikely to be able to defend themselves through trial.

But contingent fees and insurance only make trials possible. These payment schemes do not explain why civil trials actually occur, or what functions (if any) trials serve in a system in which 98% of disputes are resolved by settlement. The possible explanations fall into three categories.

1. Guidance for Settlement

Every theory of pretrial bargaining assumes that a negotiated settlement is determined, at least in part, by the parties' predictions of the outcome of the case if it did go to trial.[70] Needless to say, such predictions are uncertain, and that uncertainty may affect the terms of a settlement. For example, a risk-averse plaintiff may accept less than the expected value of her claim because she is unwilling to take the chance of an unlikely but possible defense verdict.[71] But there must be some common basis, however shaky, for assessing the consequences of a failure to settle. If trials became vanishingly rare, lawyers and litigants would make increasingly crude predictions of trial verdicts. As a result, there would be more cases in which their ill-informed guesses would be too far apart to compromise; which would lead to more trials, more verdicts, and better information on trial outcomes; which, in turn, would produce more settlements, and reduce or stabilize the trial rate.[72] For all we know, the few trials that now occur are pretty close to the minimum number our settlement-dominated system requires.

---

69. *See* Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1634 (1994).

70. *See, e.g.*, Cooter et al., *supra* note 10; Cooter & Rubinfeld, *supra* note 11; Eisenberg, *supra* note 11; Priest & Klein, *supra* note 11.

71. *See* Gross & Syverud, *supra* note 17, at 352–55.

72. Mass tort litigation in products liability cases presents an interesting example of this effect. Early in the history of litigation over a particular product—the Dalkon Shield inter-uterine device, for example, or the drug Bendectin—there is great uncertainty about the likely outcomes, and many cases go to trial. After a pattern of results is established at trial, settlements and dismissals became the rule. *See generally* Francis McGovern, *Toward a Functional Approach to Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 482–83 (1980); Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 310 (1992).

2. Strategic Bargaining and Strategic Intransigence

In litigation, as in other adversarial contexts, many of the moves in negotiation are "strategic"—ploys that are used to mislead and manipulate. Thus litigants will conceal or distort information to impress their opponents, demand things that they do not want in order to get other concessions that they do, and play chicken with the opposition in order to get paid to avoid trials that nobody wants. When strategic bargaining works, it improves the terms of settlement—you may get an additional $20,000 out of a defendant by convincing him that otherwise you will go to trial even if it costs you $100,000—but if he calls your bluff the result may be no settlement at all.[73]

Our data show clear signs of this sort of strategic bargaining. For example, most defendants in our commercial trials made puny settlement offers and then got hammered in court. In 1985–86 the offers in commercial trials averaged $574,000 less than the verdicts (see Table 20) and the defendants lost 67% of the trials (see Table 26); in 1990–91 they averaged $1,710,000 less (see Table 21) and the defendants lost 55% of the time (see Table 27). Would not it have made simple economic sense for many of these defendants to offer more and settle instead of losing? In some individual cases, of course, that must be true, but overall we think not. Notice that for the most part the *plaintiffs* in these cases played along with the defense and made puny *demands*—on average $322,000 less than the verdicts in 1985–86 (see Table 20) and $710,000 less in 1990–91 (see Table 21)—in contrast to personal injury plaintiffs, who demanded on average a great deal more than the juries gave them. If the commercial plaintiffs who ultimately went to trial were willing to settle for that little, those who did settle may have agreed to take an even smaller fraction of the jury value of their claims. Why? The great majority of these commercial plaintiffs are individuals, and (unlike personal injury plaintiffs) most of them must pay some or all of the costs of trial: Over a third pay their lawyers at least partly by the hour (see Table 5), and two-thirds advance at least a portion of the trial expenses (see Table 7). Very likely, most of these plaintiffs are reluctant or unable to invest money in litigation, even in winning cases, and the defendants can take advantage of their timidity by sticking to low-ball offers. That strategy, however, requires the defendant to maintain a posture of intransigence: Take $20,000 or go to trial. This may be the best approach, and it may work 95% of the

73. Cooter et al., *supra* note 10, at 235–37; Mnookin & Kornhauser, *supra* note 10, at 975.

time, but when it fails, the result probably will not be a settlement for $100,000, but an expensive trial followed by an even larger verdict.

When a party to a dispute is a repeat player—a person or an institution that participates in a steady stream of litigated cases—it has an additional incentive to behave strategically: to influence the outcomes of other cases.[74] For example, a newspaper may refuse to ever settle any defamation claim, regardless of the merits or the cost, in order to discourage libel suits by building a reputation as a stubborn and expensive opponent.[75] On the other hand, a manufacturer may quietly settle a products liability case in order to avoid a public trial that could produce a dangerous precedent if the manufacturer loses, and might provoke other similar lawsuits even if the manufacturer wins.[76]

The most common repeat players in civil litigation for monetary damages are not parties themselves, but agents of the parties—plaintiffs' attorneys and insurance companies. This creates the possibility of conflicts of interest. On the plaintiff's side, the attorney may want to go to trial to establish herself as a winner, or at least as someone who will fight to the expensive end. Such a reputation might bring in business, it might even help future clients, but it has no value to the current one-shot plaintiff.[77] On the defense side, the most common potential conflict occurs in cases with doubtful liability and damages in excess of the liability limit of the defendant's insurance policy. If the plaintiff makes a demand at or near the policy limit, the defendant will probably want to take the settlement, which is free to him, rather than risk a trial after which he might be stuck with personal liability for damages above

---

74. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–103 (1974).

75. *See, e.g.*, Jonathan Friendly, *Journal Settles Libel Suit for $800,000*, N.Y. TIMES, June 9, 1984, at A8.

76. *Cf.* Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC'Y REV. 371, 386 (1990) (exploring why congregations of cases arising from a single product display common features and trace of discernable career over time).

77. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 712–13 (1986). This is not the only possible basis for a conflict. In addition, the attorney—if she is a sufficiently well-established player—may do better in the long run by going to trial in high risk/high gain cases, rather than accepting comparatively low settlements, while for the plaintiffs, whose future financial security is at stake, that course will often pose an unacceptable risk of no recovery. On the other hand, a busy attorney who is entitled to a one-third contingency fee may prefer a $15,000 settlement after 10 hours of work to investing an additional 100 hours to raise the settlement to $45,000—which would triple the client's recovery but reduce the attorney's hourly fee from $500 to $150. *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 198–202 (1987).

that limit. Most liability insurance contracts, however, give the insurance company the power to accept or reject settlements,[78] and the insurance company may prefer a trial: It cannot lose more than the policy limit one way or the other, and, for the price of trying the case, it might save itself a settlement of about that amount.[79]

We do not doubt that plaintiffs' attorneys and defendants' insurers sometimes act in conflict with the best interests of the parties. But we do not believe that such conflicts (strategic or otherwise) are a common cause of trials. Taking a case to trial against the interests of the client violates professional norms, and may subject the attorney or the insurance company to formal or informal sanctions.[80] Norms and sanctions do not eliminate abuses, but they do suggest that the disfavored behavior is the exception rather than the rule. In this context, our survey data are consistent with that expectation. The attorneys we interviewed frequently said that the trial was caused by the opposition's stupidity or stubbornness, but no defense attorney said that there was no settlement because the plaintiff's attorney wanted a shot at a major verdict, and no plaintiff's lawyer said that it happened because the defendant's insurance company had little to risk at trial and was unconcerned about its insured.

If we ignore occasionally serious conflicts and assume that attorneys and insurance companies handle these cases in the best interests of the parties, then the repeat players in ordinary civil litigation are all on the defense.[81]

---

78. On the other hand, many medical malpractice insurance policies also give the defendant veto power over settlements. *See* Gross & Syverud, *supra* note 17, at 361–62; *infra* notes 89–94 and accompanying text.

79. *See* Syverud, *supra* note 5, at 1129–30. Even when there is no applicable liability limit or coverage dispute—when without question there is full insurance coverage of any potential judgment or settlement—there are many reasons why the interests of insurers and insureds may come to conflict. *See* Charles Silver & Kent D. Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 264–68 (1995).

80. On the defense side, if the result is a judgment against the defendant in excess of the policy limits, the insurer may be held liable to its insured for that excess judgment and possibly for emotional distress to boot. Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967). On the plaintiff's side, a personal injury attorney who regularly loses at trial after advising clients to refuse substantial settlements may also lose out in the competition for future clients. This effect is likely to be strongest for the substantial fraction of personal injury cases that are referred to the trial lawyers by other attorneys, because the referring attorneys are likely to have better information than the clients themselves. *See* JEROME E. CARLIN, LAWYERS ON THEIR OWN: THE SOLO PRACTITIONER IN AN URBAN SETTING 82, 141 (1994) (noting that "upper level" lawyers and personal injury lawyers rely heavily on referrals from other lawyers).

81. One consequence of this pattern is that insured or institutional defendants, who are (presumably) risk neutral, can obtain comparatively cheap settlements from risk-averse individual plaintiffs. ROSS, *supra* note 18, at 214. This follows more from the difference in resources between the parties than from their proclivities for litigation. A related consequence is that settlements are easier to obtain because the plaintiffs, who are in the game for only one play, value the case at or

Plaintiffs are almost always individuals and therefore necessarily one-shot players (see Table 3), while defendants, if they are not large businesses or government entities—and therefore likely to be repeat players in their own right—are almost always insured, usually completely (see Table 11).[82] In other contexts, repeat players may just as easily be plaintiffs. This is true of some private litigants, e.g., environmental groups, and it is the rule for public litigants such as the Internal Revenue Service, regulatory agencies, and, most important, criminal prosecutors. If a repeat party is a plaintiff, it can set its agenda and influence law and practice by its *filing strategy*. Indeed, that is likely to be its main tool, because nothing that happens later is as influential as the decision to file in the first place—especially because most repeat-player plaintiffs see many more possible cases than they can ever handle.

A repeat-player defendant can hope to exercise some control over the general pattern of litigation, but only through its *settlement* strategy. Unlike a repeat-player plaintiff, it has no other way to send signals or channel cases. The only ultimate threat it can make is the threat of trial, and it must take some cases to trial to keep that threat credible. Therefore we would expect the defendants in these ordinary civil cases to be more likely than the plaintiffs to engage in strategic bargaining,[83] and more prone to take cases to trial for strategic reasons. Our survey data support this prediction. Although each side was apt to say the other caused the trial, overall the attorneys were more likely to say the defendants, rather than the plaintiffs, did it, 52% to 42%.

One way to influence litigation is to win most trials, and repeat players on both sides do just that. The nonrepeat-player opponent is more risk averse; therefore, the repeat-player plaintiff (e.g., prosecutor) can win most trials by taking strong cases to court and offering defendants in weak cases deals that they are afraid to refuse, and the repeat-player defendant (e.g., insurance company) can do the same. *Plaintiffs* win most *cases* in both situations, usually by plea bargain or settlement: repeat players or not, they rarely file unless they expect to win. But the repeat-player plaintiffs (prose-

---

near the *likely* outcome, while defendants, who are sued repeatedly, value it at a higher figure that reflects in part the unlikely risk of an unexceptionally large judgment. *See supra* text accompanying note 50.

82. Although the insured is not likely to have any interest in the outcome of other cases, her insurance company can bargain strategically to affect those outcomes even when it is acting entirely consistently with her interests. In particular, if the entire claim is indisputably within the liability limits of the insurance policy, then the insured is not at risk regardless of the outcome and the insurer is free to pursue other goals.

83. *See* HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 103–04 (1991) (stating that defendants appear to be more likely than plaintiffs to engage in tactical bargaining).

cutors) also win 75% or more of criminal *trials*,[84] while insured civil defendants (who settle and pay up on most *claims*) win approximately 70% of personal injury trials. See Tables 26 and 27.

Our settlement data show clear signs of strategic bargaining by defendants that is aimed at goals beyond the outcomes of the trials at hand. Many of these cases went to trial without any meaningful pretrial negotiations because the defendants made no settlement offers whatever. These zero-offer cases make up over a quarter of all trials, and about 60% of medical malpractice trials. See Tables 15 and 16. A zero offer is never a reasonable assessment of the expected cost of a case to a defendant. The trial itself is never free and usually expensive, and there is always a chance, however low, that a jury will side with the plaintiff.[85] But unlike the low-ball strategy that defendants seem to use in commercial cases, making zero offers is not a promising way to avoid trials. If no face-saving settlement whatever is offered, a plaintiff who has already filed and pursued a case may well plow ahead to the end, at high cost to everyone. This is particularly true in personal injury cases, in which the costs of trial are usually borne by the plaintiff's attorney (see Tables 5 & 7)—usually a repeat player who has the money to spend, and who can afford to lose most cases as long as she wins some big ones.[86] On the other hand, a defendant (or his insurer) might make such an offer to affect *other litigation*. Refusing to settle increases the risk to future litigants and may discourage future claims, and taking winners to trial may be worth the cost if it helps you bluff successfully in negotiations with plaintiffs in future cases.

---

84. For example, in fiscal year 1994, 78% of defendants in all federal criminal trials, and 85% of defendants in federal criminal jury trials, were convicted. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 462 tbl.5.28 (Kathleen Maguire & Ann L. Pasture eds., 22d ed. 1995). In general, a conviction rate of 75% is typical for American jurisdictions. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 32 (8th ed. 1994). (In Japan, this prosecutorial power to control court outcomes is carried much further: 99.8% of criminal trials end in conviction—which means, of course, that the real adjudication takes place before trial. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 318 (1992).) Prosecutors have normative as well as institutional motives to aim for a high rate of victory at trial: Because the trial process itself is a severe hardship to the defendant, they are not supposed to file charges unless they are very likely to be able to obtain a conviction.

85. Gross & Syverud, *supra* note 17, at 342. Damage awards in zero-offer cases are comparatively high. For example, in our 1985–86 sample the mean was $108,000 (not counting litigation costs). By contrast, mean awards for *low*-offer cases were one-third to one-fourth that size, which we interpret as evidence that many of those low positive offers really were discounted forecasts of the expected values of the outcomes at trial. *Id.* at 343.

86. *Id.* at 345–48.

3. Non-Economic Interests

Trials may also occur because the parties have non-economic interests in obtaining judgments. Several scholars have discussed the importance of one particular non-economic motive: the desire to have a day in court to obtain formal justice.[87] They claim that many litigants want a type of satisfaction that settlement rarely provides—public vindication—and they argue that vindication is a goal that our legal system should promote.

Our interviews with attorneys in the 1990–91 trials provide some hints on the role of non-economic stakes in civil trials. For the most part, our findings are negative. In 735 interviews, only three attorneys mentioned a desire for vindication as an explanation for why their case went to trial. Two attorneys said their case was tried because a party demanded her day in court; they were on the opposing sides of the same case, and each pointed a finger at the other's client. Only a few attributed trials, even in part, to the desire of a client for a hearing or a public judgment. Nor did any other non-economic motive surface as a common explanation for these trials.[88]

Why is vindication all but ignored by these attorneys as an explanation for trials? There are several possibilities. The attorneys may undervalue their clients' desire for vindication and focus on their clients' (and their own) economic interests in the litigation. Some attorneys may have become so acculturated to the professional view that trials are bad that they fail to notice that their clients actually want to go to court. If so, they might underestimate the role of non-economic factors in the clients' trial-seeking behavior: If a desire for vindication is driving their cases to trial, they don't see it.

It is also possible that the clients in most mine-run litigation in California courts do not care much about having their day in court. Despite what some scholars think, they may, in fact, have no preference for public

---

87. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Resnik, *supra* note 5.

88. Explicitly emotional explanations, including spite, figured in only a very small number of interviews. Judging from this small sample, they seem to be more common in commercial than in personal injury cases—which makes sense, because parties in commerical cases are more likely to have had a pre-existing relationship.

adjudication over private settlement, unless there is an economic advantage. Finally, it may be that many plaintiffs and defendants would prefer vindication at trial to private settlement, but they do not have the power to act on that preference and force a trial, because the defendant's insurance company and the plaintiff's attorney usually control the settlement decision. As a result, few of the cases that do go to trial get there because of a party's desire for vindication.

Other less direct data suggest that a desire for vindication was, indeed, at the root of many trials—at least in one type of case. As we have seen, 27% of these cases did not settle because defendants offered nothing to the plaintiff, at any point in the pretrial proceeding. See Tables 15 and 16. This "zero-offer" rate varied across types of claims, from a low of 11% to 15% in vehicular negligence trials, to a high of 59% to 60% in medical malpractice trials. We believe the high rate of zero offers in medical malpractice cases is best explained by the desire of physicians for vindication at trial.

Most physician malpractice insurance policies sold in California contain a "consent to settle" clause that requires the agreement of the doctor to any nonzero settlement negotiated by the insurer.[89] Lack of consent is mentioned by an attorney as a cause of trial in nineteen of the thirty-two 1990–91 zero-offer medical malpractice trials,[90] and we suspect that it was a factor in at least several other medical malpractice trials in which no attorney specifically mentioned it. We also know that the trial rate in medical malpractice cases is considerably higher across the nation than for any other category of personal injury litigation,[91] and that doctors win defense verdicts in more than 90% of the cases in which there is no settlement offer at any point in the litigation.[92] What explains these patterns?

What seems to be happening is that doctors are insisting on trial in some medical malpractice cases in which they expect to obtain public vindication. This is most likely to happen when the doctor is convinced that she acted in a professionally responsible manner, but has nonetheless been wounded in her self-esteem and damaged in her reputation by a patient's claim that she committed malpractice. Cases in which the defendant continues to feel that way up to the time of trial are likely to be winners for the defense. In other

89. In most civil litigation, the insurance company controls the decision to settle, and insurance contracts do not require the consent of the insured before a settlement can be reached. Syverud, *supra* note 5, at 1172–85.

90. For example, in one case a defense attorney stated that "[t]he doctor was very angry about this case and would not consent to any offers," and in two other cases defense attorneys said that the doctor "felt strongly that he had done nothing wrong."

91. Eisenberg et al., *supra* note 2, at 7-8; Gross & Syverud, *supra* note 17, at 364.

92. Gross & Syverud, *supra* note 17, at 363 tbl.7.

contexts, insurance companies settle most odds-on winners for comparatively small amounts, in order to save trial costs and to minimize risks. Not here. Unlike other defendants, doctors have negotiated insurance contracts that give them the power to make that choice themselves. Moreover, because the insurance company remains responsible for the defense costs and for damage awards at trial, the defendant doctor can usually reject a low settlement without undertaking personal liability for legal costs or for any judgment within policy limits. The usual result is a trial that the insurance company pays for, and the doctor wins.[93] In other words, in at least one type of litigation in which reputation and vindication are particularly important for a coherent constituency of defendants, those defendants have been able to order their private relationships with their insurance companies in a way that protects those interests.[94]

C. How Might We Change This System?

As we noted at the outset,[95] a major—and successful—goal of lawyers, judges, and rule makers is to promote settlements. We do not advocate an attempt to further reduce the extremely low trial rate in our civil courts, but if a further reduction is sought, our research suggests that some methods are more likely to succeed than others.

The techniques of encouraging settlement can be roughly divided between two approaches. The first set of techniques rely on *information*. They attempt to achieve settlement by providing unbiased information to the parties about the dispute. The second set of techniques rely on *incentives*. They encourage parties to settle by increasing the risks or reducing the rewards of proceeding to trial.

---

93. The extremely high rate of defendant success in zero-offer medical malpractice cases occurs in trials in which the only defendants are individual doctors. When there is a hospital as a defendant, fewer of the trials are zero-offer cases, and those zero-offer trials are more likely to result in verdicts for the plaintiff. *Id.* at 362–63. The likely explanation is that most hospitals (unlike physicians) are insured under policies that required them to pay a portion of the defense costs and of any judgments against them. Because they do not get a free ride, they are less likely to insist on trial in a winning case that could be settled cheaply, so the mix of cases that does go to trial includes fewer clear winners. *Id.* at 363.

94. Since 1991 (and the trials from which our second sample is drawn), increasing numbers of doctors have become employed by health maintenance organizations and other forms of managed care plans. The liability insurance arrangements for these plans usually divest the doctor's right to veto settlements and, instead, assign that power to the corporate care provider. Telephone Conversation with Gail Agrawal, Associate General Counsel, Aetna Life & Casualty Co. (Mar. 15, 1996).

95. *See supra* notes 3–6 and accompanying text.

Information-based techniques include judicially supervised settlement conferences, mediation, and most other forms of court-sponsored dispute resolution. The theory is that if both parties to a dispute confront an evaluation of their case by a disinterested expert, they are more likely to converge on a single estimate of the outcome, and to agree to settle. While such techniques may contribute to the existing low trial rate,[96] our data suggest that they are unlikely to succeed in squeezing out many more trials. Mediation and similar procedures are probably most effective in helping the parties close the gap in their predictions of the jury's evaluation of damages, but that does not seem to be the main problem in the cases that go to trial.[97]

Predicting verdicts on liability is another matter. Most litigants on both sides already discount their estimates of damages in light of their uncertainty about the jury's decision on liability.[98] On the plaintiffs' side, that explains the large number of judgments that exceed the plaintiffs' demands; on the defendants' side, it explains the fact that in most cases with zero awards the defendants did offer money to settle the claims.[99] The trials that occur, nonetheless, are primarily in cases in which the parties remain so far apart in their predictions of the decision on liability that they are willing to gamble on a jury's notoriously unpredictable verdict. In that context, no information from a disinterested expert is likely to change their minds.

The alternative to attempting to provide more information about the outcome of the case is to alter the rules under which it is litigated. The common method is to increase the risk of trial by requiring the losing party to pay some or all of the winners' legal fees.[100] Other proposals change the structure of incentives at trial by limiting the damages that a party may recover, or the fees that its attorney may receive.[101] We do not necessarily advocate such changes, but we do believe that they have greater potential to depress the trial rate than attempts to provide more information to litigants who are already willing to bear the risks and costs of gambling on trial on the basis of the best information they have been able to obtain. By changing the

96. *See* Resnik, *supra* note 7, at 243–53.

97. *See supra* pp. 50–59.

98. *See* text *supra* following note 68.

99. Defendants offered money to settle claims in 63% of the 1985–86 trials that produced defense verdicts and 68% of the 1990–91 trials that produced defense verdicts.

100. *See, e.g.*, The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994). *See generally* Kritzer, *supra* note 11 (reviewing fee-shifting provisions and the literature on its effect on litigation behavior).

101. *See, e.g.*, Lawyer Contingent Fee Limitation Act, *reprinted in* CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION MAR. 26, 1996, at 70–72 (1996); *Hearings*, *supra* note 57.

structure of costs and rewards, it is possible to change the odds of favorable outcomes for one side or the other, or for both, across whole categories of cases. The result might be an overall change in the pattern of civil litigation, including, perhaps, a reduction in the number of trials.

Or perhaps not. For example, consider the effects of eliminating contingent fees altogether—an extreme proposal, and, in our opinion, an extremely bad idea. If that happened, the number of civil law suits would be reduced drastically, at least in the short run; and the distribution of cases that were filed would change dramatically (e.g., a higher proportion of the remaining filings would be in commercial cases); new institutions would be created to cope with the new needs generated by the system (e.g., new systems for paying legal fees, including, perhaps, new forms of insurance); the pattern of settlements and trial outcomes would change in unforeseeable ways; and the number of trials *might* go down. But it also might not. It could turn out that we would still need as many trials as we now have, or more to define the contours of the new system.

Procedures that affect the risks of trial may also have the opposite effect. The risk of large jury verdicts on the one hand, and of defense verdicts on the other, weigh heavily in favor of settlement. Ancient procedural devices such as remittitur and additur, and newer ones such as damage caps[102] and limitations on punitive damages,[103] should (if anything) *increase* the percentage of filed cases that proceed to trial. In addition, or instead, the parties to a lawsuit may agree privately to restrict the risk of extreme outcomes at trial. A striking example is a technique known as the "high-low agreement."[104]

A high-low agreement is a partial settlement in which the plaintiff and the defendant each insure the other against an extreme verdict. The plaintiff agrees to collect no more than a maximum amount specified in the agreement, regardless of a higher jury verdict, while the defendant agrees to pay no less than a minimum amount specified in the agreement, regardless of a lower jury verdict. High-low agreements have been reported since at least 1968.[105] They are usually reached shortly before or during trial,[106]

102. *See, e.g.*, Medical Injury Compensation Reform Act of 1975, CAL. CIV. CODE § 3333.2(b) (West Supp. 1996) (capping non-economic damages in medical malpractice cases).

103. *See, e.g., Hearings, supra* note 57.

104. *See* John L. Shanahan, *The High-Low Agreement*, FOR THE DEFENSE, July 1991, at 25; Leonard L. Finz, *The Hi-Lo Contract: A Trial by Chance*, 48 N.Y. ST. B.J. 186 (1976).

105. *See* Robert Coulson, *Negotiating Control Contracts: Trial Counsel Reduce Their Need for Appeals*, 52 JUDICATURE 190, 193 (1968).

106. Shanahan, *supra* note 104, at 25–26.

particularly in personal injury cases involving large potential damages and uncertain liability;[107] they are legal and enforceable.[108]

High-low agreements permit private parties to limit the scope of a jury's fact-finding on damages in ways that go beyond those permitted by the rules of evidence and summary judgment. Under this procedure, trial outcomes are constrained by the settlement negotiations that preceded them; the agreement to participate in this constrained trial is the last step of an incomplete compromise. The availability of this option (if the parties are aware of it) will tend to discourage full settlements and to facilitate trials. It is no secret that our system of civil justice has generated a pent-up demand for *low-cost* litigation.[109] As a result, a procedure that lowers the cost of litigation—for example, a small-claims court—will increase the volume of litigation and the number of trials (albeit cheaper, quicker trials). The development of the high-low agreement demonstrates the existence of a parallel demand for *low-risk* adjudication. Any technique, public or private, that reduces the range of possible outcomes at trial could help answer that demand by making trial less scary, which might encourage more parties to take their chances and try it.

CONCLUSION

The essence of adversarial litigation is procedure. We define justice in procedural terms: the judgment of a competent court following a trial that was procedurally correct. When we want to improve our judicial system we pass a procedural reform, which invariably means elaborating old procedural rules or adding new ones—rules that govern the presentation of evidence and arguments, rules that create opportunities to investigate and to prepare evidence and argument, and rules that are designed to regulate the use of the procedures that are available to investigate, prepare, and present evidence and argument. The upshot is a masterpiece of detail, with rules on everything from special appearances to contest the jurisdiction of the court, to the use of exhibits during jury deliberation. But we cannot afford it. As litigants, few of us can pay the costs of trial; as a society, we are unwilling to pay even a fraction of the cost of the judicial apparatus that we would need to try most civil cases. We have designed a spectacular system for adjudicating disputes, but it is too expensive to use.

---

107. *Id.* at 27.
108. *Id.* at 28; *see also* Coulson, *supra* note 105, at 192.
109. *See* Alschuler, *supra* note 9, at 1811–17.

We respond to this dilemma on two levels, private and public. The private response is to create institutions that enable parties to aggregate the costs, risks, and benefits of litigation across many cases: liability insurance for defendants to pay for legal fees as well as damages, and contingency fees for plaintiffs. These structures make it possible for parties to prepare for trial, and to retain trial as an option. The public response is to actively discourage trials. We provide some positive assistance in reaching compromises, but the main push is negative: Litigants learn to avoid trial in order to reduce their risks and save their money. Formal litigation is presented not as an adjunct but as an alternative to private settlement; not as an aid but as a threat.

The main function of trials is not to resolve disputes but to deter other trials. And they do, very effectively. One consequence is that those few cases that do go to jury trial—perhaps 2% of civil filings, and less than 1% of all civil claims—are very different from the mass of cases that settle. They are typically high-risk, all-or-nothing cases, cases with unusual facts or intransigent parties, cases that defy compromise. Their outcomes, by comparison with ordinary work-a-day settlement cases, are costly, unpredictable, and sometimes bizarre. Because jury trials and jury verdicts are the most visible products of litigation, these extreme and unrepresentative cases distort public perception of the administration of civil justice. In the process, they perpetuate the image of litigation as terror, which helps drive all but the most hopeless disputes out of court, which means that any general policy based on what happens in those cases that *are* tried will be misconceived.

In 1921, Learned Hand wrote that "as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death,"[110] a widely repeated and deceptively simple sentence. Judge Hand's statement was not intended as a report of an idiosyncratic aversion, but as a judgment by one who ought to know that litigation is dreadful. Lesser judges and mere lawyers mostly agree, including us. Our research adds evidence to support one part of this widely shared belief: Those law suits that are fought to the end are indeed risky, costly, and unpredictable.

Hand's main message, of course, is not a description, but an injunction: Don't litigate. It is a concise expression of the repeated advice of generations

110. Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, *in* 3 LECTURES ON LEGAL TOPICS 89, 105 (1926), *quoted in* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 40 (1949), and GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 146 (1994). In a speech on the inefficiency of trials, Hand argued for simpler pleadings and increased judicial discretion in the administration of trials. For a fascinating look at the use, misuse, and tactical quotation of Hand and Holmes, see Michael Herz, *"Do Justice!": Variations of a Thrice Told Tale*, 82 VA. L. REV. 111 (1996).

of conscientious lawyers: Anticipate problems and avoid conflicts; if conflicts arise, resolve them privately; if at all possible, do not sue. And when lawsuits are filed, this advice is transformed into the mantra of the judge: Settle. Every day, in countless settlement conferences, trial judges retail their own versions of Learned Hand's wisdom: "They're offering you $70,000. A jury could give you $150,000, but I've seen folks just like you come up empty, lots of times. If it were me, I'd be scared; I'd take it." More often yet, this lecture is delivered by lawyers long before any judge enters the picture.

There is another injunction that could be embedded in Judge Hand's aphorism: Our system of justice is terrible, and we must change it. But we do not understand him that way anymore than we interpret him to mean that a dispute is an injury and a lawsuit the process by which it is healed. We not only accept as a fact that it is the *lawsuit* that is the disease, we seem to relish it. If trial were a safe, soft, reassuring process, many more disputants would seek trial and the courts would be overwhelmed; they are struggling as it is at a 2% trial rate. But there is no cause for concern. The major elements of the system—adversarial factfinding, trial by jury, contingent fees, liability insurance—all fit together to make trial the dangerous event we need to drive nearly everyone to settle.